Supreme Court, U.S.
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Supreme

October Term, 1997

GERALD B. LEFCOURT, P.C.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

MARTIN G. WEINBERG
OTERI, WEINBERG & LAWSON
Statler Building
20 Park Plaza/Suite 905
Boston, Massachusetts 02116
(617) 227-3700

LAWRENCE S. HORN
ROBERT J. ALTER
SILLS CUMMIS ZUCKERMAN
RADIN TISCHMAN EPSTEIN
& GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102
(201) 643-7000

LAWRENCE S. GOLDMAN
Counsel of Record
ELIZABETH M. JOHNSON
GWEN M. SCHOENFELD
ANASTASIA G. MARGARIS
GOLDMAN & HAFETZ
500 Fifth Avenue
New York, New York 10110
(212) 997-7400

NATHAN Z. DERSHOWITZ
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue
New York, New York 10118
(212) 967-0667

Attorneys for Petitioner

145323

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

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94 pp

QUESTIONS PRESENTED

1. Should certiorari be granted to resolve the conflict between the circuits as to whether an attorney must disclose fee information concerning a client even if the information would incriminate the client in the matter for which he sought legal assistance?

2. Should certiorari be granted to resolve the conflict between the requirements of 26 U.S.C. § 6050I, as accepted by the Second Circuit, and ethical rulings which prohibit attorneys from voluntarily disclosing confidential information harmful to a client?

3. Should certiorari be granted to review the determination of the Court of Appeals for the Second Circuit, in conflict with the law in other circuits, that *Cheek v. United States*, 498 U.S. 192 (1991), applies only to criminal cases and not to punitive penalties?

LIST OF PARTIES

The petitioner is Gerald B. Lefcourt, P.C., a New York professional corporation, which is wholly owned by Gerald B. Lefcourt and has no parent or subsidiary company.

The respondent is the United States of America.

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The Court of Appeals' denial of the petition for rehearing and suggestion for rehearing *en banc* is not reported and is reprinted in the Appendix to the Petition, at 47a.

The opinion and order of the United States District Court for the Southern District of New York, granting the respondent United States of America's motion for summary judgment, is not reported and is reprinted in the Appendix to the Petition, at 22a.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was entered on September 10, 1997. On December 17, 1997, the Court of Appeals denied the petition for rehearing and suggestion for rehearing *en banc*. This Petition is being submitted within the time permitted by the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution, and 26 U.S.C. §§ 6050I, 6721(e), 6724, which are set out verbatim in the Appendix to the Petition.

STATEMENT OF THE CASE

A. Statement of the Facts

The Firm of Gerald B. Lefcourt, P.C. (hereinafter "the Firm" or "Lefcourt") specializes in the defense of persons accused of violating the criminal law. The Firm was hired as counsel by a defendant facing federal charges alleging a narcotics and money laundering conspiracy, in violation of 18 U.S.C. § 1956(a)(2)(B)(I) and 21 U.S.C. §§ 963, 960(a)(1) and (b)(1)(B)(ii). The brother and co-defendant of Lefcourt's client paid Lefcourt $25,000 in cash on behalf of the client, apparently with money belonging to the client. On July 9, 1993, the Firm filed an Internal Revenue Service (hereinafter "IRS") Form 8300 with the IRS. Appendix at 60a. 26 U.S.C. § 6050I requires all persons who receive in excess of $10,000 in cash in their trade or business to report the receipt of the cash to the IRS. IRS Form 8300 is the form designated by the IRS for making the report. That form purports to require the cash recipient to report, in addition to the receipt of the cash, the identity of the payor, the identity of the recipient of the services or goods, and other information.

The Form filed by the Firm on July 9, 1993 reported to the IRS that the Firm had received in excess of $10,000 in payment of legal fees, reported the date of the transaction, and the reason for the payment. The Firm affirmatively stated on the Form that it could not disclose the identity of the payor because such disclosure would violate the attorney-client privilege, the Fifth and Sixth Amendments to the United States Constitution, comparable state provisions, and the Lawyer's Code of Professional Responsibility. Mr. Lefcourt also submitted an affidavit with the form, in which he explained that providing the information requested could severely prejudice the interests of his client and undermine the Firm's ability to provide effective representation.

The IRS subsequently imposed a penalty in the amount of $25,000 upon the Firm, pursuant to 26 U.S.C. § 6721. The Firm paid the penalty, a jurisdictional prerequisite to bringing an action to challenge the assessment.

The Firm then filed with the IRS a timely claim for refund of said payment, but the IRS disallowed the claim for refund.

On December 6, 1994, the Firm brought an action in the United States District Court for the Southern District of New York seeking a refund of the $25,000 penalty. The jurisdiction of the District Court over the action was conferred by 28 U.S.C. § 1346(a)(1).

On May 22, 1995, following the conclusion of the criminal trial of the client on whose behalf the cash payment at issue was made, when the Firm believed it no longer had a duty to withhold the information, the Firm filed an amended IRS Form 8300 and provided the information that had been omitted from the original filing.

B. The Lower Court Decisions

In the District Court, both parties in the civil action moved for summary judgment. By order dated May 15, 1996, the District Court denied the Firm's motion for summary judgment and granted the government's motion for summary judgment.

The District Court found that the Firm was aware of the requirements of 26 U.S.C. § 6050I, but

> voluntarily, consciously, and intentionally failed to comply. Plaintiff's failure to include the required information in the 8300 Form . . . constitutes a willful act since it was undertaken in intentional disregard of the plain meaning of § 6050I.

Appendix at 37a. Although the court acknowledged that the law of the Second Circuit recognizes exceptions to the filing requirement, the court found that the Firm had made no showing that the exception would have applied under the facts of the case. Appendix at 42a.

The United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court by order dated September 10, 1997. The Court of Appeals concluded that no "special circumstances" excusing non-compliance with the Form 8300 requirements exist "simply because the provision of client-identifying information could prejudice the client in the case for which legal fees are paid." 125 F.3d at 88; Appendix at 20a. The Court of Appeals also concluded that, although no case had directly so held, this principle was so firmly established in the Second Circuit when Lefcourt had filed the Form 8300 in July 1993 that the Firm had no reasonable basis for failing to provide the information required on the form. 125 F.3d at 88-89; Appendix at 20a-21a. The Court of Appeals, in rejecting the "legal advice exception," expressly disagreed with the holding of *United States v. Gertner*, 873 F. Supp. 729 (D. Mass.), *aff'd on other grounds*, 65 F.3d 963 (1st Cir. 1995). 125 F.3d at 88; Appendix at 19a.

The District Court also held that Lefcourt's good faith belief in the legality of the position was no defense to the penalty since the heightened *mens rea* requirement set forth in *Cheek v. United States*, 498 U.S. 192, 201 (1991), applied only to criminal cases. 125 F.3d at 82-83; Appendix at 8a-9a.

The Firm subsequently filed a petition for rehearing and suggestion for rehearing *en banc*, which the Court of Appeals denied by order dated December 17, 1997.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE SIGNIFICANT CONFLICTS BETWEEN CIRCUITS REGARDING THE APPLICABILITY OF THE ATTORNEY-CLIENT PRIVILEGE TO CLIENT-IDENTIFYING AND FEE INFORMATION.

In recent years, Congress, the federal courts, bar associations, and individual practitioners, especially criminal defense lawyers, have grappled with the question of when an attorney is obligated to provide information and when she is obligated to withhold it if the information could possibly incriminate the client. In this case, Lefcourt claimed that the attorney-client privilege, as well as his client's Fifth and Sixth Amendment rights, prevented him from disclosing to the government information identifying a client under indictment who had paid for Lefcourt's legal services in cash.

The Second Circuit determined that Lefcourt did not act "reasonably" in withholding the information because it, like virtually all fee information, was not protected by the attorney-client privilege. *Lefcourt*, 125 F.3d at 87-88. In so doing, the Second Circuit rejected the rulings of other courts, including the First, Ninth and Tenth Circuits, that have held that, in certain circumstances in which disclosing fee information would incriminate the client, fee information is protected by the privilege.

Under existing law, attorneys are now required, in some Circuits, to disclose to the IRS the identity of their clients who pay legal fees in cash in excess of $10,000, or else pay a substantial penalty. *See e.g. United States v. Leventhal*, 961 F.2d 936, 940-41 (11th Cir. 1992). Under the law of other Circuits, the information is considered privileged under certain circumstances, *United States v. Gertner*, 873 F. Supp. 729, 735-

736, *aff'd on other grounds*, 65 F.3d 963 (1st Cir. 1995), and attorneys who disclose it may be subject to professional discipline for an unethical disclosure. Additionally, even those circuits which held that attorneys may not refuse to disclose client-identifying information on 8300 Forms may do so under "special" or "extraordinary circumstances." *United States v. Blackman*, 72 F.3d 1418, 1426 (9th Cir. 1995), *cert. denied*, 117 S. Ct. 275 (Oct. 7, 1996); *Leventhal*, 961 F.2d at 940-941; *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 506 (2d Cir. 1991). However, no court, even the court below, has defined what those "special circumstances" are, so that attorneys who believe that special circumstances exist do so at their peril. Thus, there is no uniform rule as to whether attorneys must disclose the identity of their clients on 8300 Forms in every circumstance, whether there are any special circumstances which excuse an attorney from such disclosure, and, if so, what those circumstances are.

Lefcourt was retained to provide legal representation to a federal criminal defendant charged with conspiracy to commit money laundering and narcotics offenses. Disclosure of the information requested by the IRS Form 8300 would have provided the government with evidence of the law firm's client's unexplained wealth.[1] Such disclosure would therefore have both "implicated the client in the very criminal activity for which legal advice was sought," *In Re Grand Jury Subpoena (Anderson)*, 906 F.2d 1485, 1488 (10th Cir. 1990), and would foreseeably have resulted in Lefcourt's being called as an adversarial witness against his client, which in turn would have mandated the law firm's disqualification. *Lefcourt*, 125 F.3d at 85.[2] The court below, while not contesting

1. Although the funds were paid to Lefcourt by his client's brother-in-law, who was also a co-defendant, the funds belonged to Lefcourt's client.

2. It is predictable that the completing of Form 8300 would lead to disclosure of the client information not only to the Internal (Cont'd)

the validity of petitioner's assessment of the consequences of disclosure, nevertheless determined that the attorney-client privilege, as defined in Second Circuit jurisprudence, provided no protection against compelled client identification under the circumstances of the case.

In a variety of contexts, courts have found special circumstances that rendered client-identifying or fee information privileged.[3] Many of these courts recognize the "legal advice

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Revenue Service but also to the client's prosecutors pursuant to 26 U.S.C. § 6103. Concomitantly, the disclosure as a result of his payment to counsel would incriminate the client in a non-tax case as the possessor of "unexplained wealth", *see United States v. Barnes*, 604 F.2d 121, 146-7 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

3. *See, e.g., In re Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels)*, 767 F.2d 26 (2d Cir. 1985) (grand jury subpoena quashed where it would disrupt the attorney-client relationship); *Ralls v. United States*, 52 F.3d 223 (9th Cir. 1995) (quashing grand jury subpoena seeking fee information on ground it was inextricably intertwined with confidential attorney-client communications); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991) (attorney could not be compelled to identify client who had paid legal fees for defending another client in drug case because disclosure of payor's identity would expose as obvious confidential purpose for which payor had sought attorney's legal advice); *In re Grand Jury Proceeding, Cherney*, 898 F.2d 565, 568-69 (7th Cir. 1990) (upholding attorney's assertion of privilege not to disclose identity of unknown third party payor because fee payor's identity would convey substance of confidential communication); *In re Horn*, 976 F.2d 1314, 1317-18 (9th Cir. 1992) (quashing grand jury subpoena ordering attorney to identify client where such disclosure potentially would reveal client's motive for seeking representation, nature of services provided or strategies to be
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exception," which protects client identity and fee information when "there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought." *Anderson*, 906 F.2d at 1488 (10th Cir. 1990).

In *Gertner*, 873 F. Supp. 729, *aff'd on other grounds*, 65 F.3d 963 (1st Cir. 1995), the IRS sued two attorneys who represented a defendant in a pending narcotics prosecution for submitting incomplete Forms 8300. The district court acknowledged the rule that client identity and the source of payment of legal fees are not generally protected by the attorney-client privilege. 873 F. Supp. at 735. Nevertheless, on the facts presented, where the client's pending indictment prompted him to seek the attorney's legal assistance and when the disclosure of a large sum of unexplained cash income could "certainly be incriminating evidence," *id.*, in the pending prosecution, the court found a "strong possibility" that disclosure would incriminate the client in "the very activity for which he sought legal advice." *Id.* Thus, the *Gertner* court concluded, in a fact situation virtually identical to the one confronted by Lefcourt,

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employed during litigation); *Anderson*, 906 F.2d at 1488-93 (10th Cir. 1990) (attorney cannot be compelled to disclose client's identity and source of payment for legal fees where disclosure would reveal legal advice, incriminating evidence or confidential communications); *United States v. Buitrago-Dugand*, 712 F. Supp. 1045, 1050 (D.P.R. 1989) (suppressing attorney's statement to grand jury regarding identity of fee payor where that statement implicated defendant in criminal activity for which legal advice was sought); *In re Grand Jury Matters*, 593 F. Supp. 103, 105 (D.N.H.) (invalidating grand jury subpoenas served on attorneys requiring production of records regarding fee agreements where clients had cases pending in state court and were under investigation in federal court), *aff'd, In re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984).

the Form 8300 information was privileged.[4] *See also United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995) (holding attorney-client privilege shielded disclosure of client-identifying information on Form 8300 with respect to one of two clients because disclosure would have revealed substance of confidential communication). The *Gertner* court interpreted prior Second Circuit law that held that some "special circumstances" might create an exception to the rule that fee information is not privileged, *see, e.g., Goldberger*, 935 F.2d 501, to incorporate the "legal advice" exception. *Gertner*, 873 F. Supp. at 735-36.

The Second Circuit in this case, reading *Goldberger* in conjunction with *In re Shargel*, 742 F.2d 61 (2d Cir. 1984), in both of which cases the client was not under pending indictment, and a number of other decisions from the Second Circuit, including *Vingelli*, 992 F.2d 449 (2d Cir. 1993), rejected the "legal advice exception." The court concluded that no "special circumstances" exist "simply because the provision of client-identifying information could prejudice the client in the case for which legal fees are paid." *Lefcourt*, 125 F.3d at 88. The Second Circuit expressly disagreed with the holding of the *Gertner* court, which had explicitly relied on the *Goldberger* decision in addition to prior precedent in the First Circuit, *United States v. Strahl*, 590 F.2d 10, 11 (1st Cir. 1978), *cert. denied*, 440 U.S. 918 (1979), and the law of other circuits. *See, e.g., Anderson*, 906 F.2d 1488 (10th Cir. 1990); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

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4. On appeal, the First Circuit affirmed the district court's decision quashing the summonses, but did so on a ground independent of the lower court's privilege ruling. It left that question for another day, writing "[w]e are mindful that restricting our disposition to this narrow ground [that the summons was improperly issued] leaves larger issues unresolved. . . ." 65 F.3d at 973.

The *Gertner* court, as well as the Ninth Circuit in *Blackman*, found that the existence of a pending matter was one factor that could constitute a "special circumstance" justifying an exception to the general rule that fee information is not privileged. The Second Circuit, however, completely disregarded the effect that the existence of a pending case has on the determination whether fee information is privileged.[5]

There is thus a conflict between the Second Circuit and other circuits as to whether the "legal advice exception" applies to the general rule requiring attorneys to disclose fee arrangements and whether the existence of a pending case will constitute a special circumstance which excuses an attorney from disclosing such information on IRS Form 8300. This Court should grant certiorari in order to determine the issues and resolve the apparent conflict in circuits.

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5. The Second Circuit also held that disclosing the information at issue would not incriminate Lefcourt's client, stating that since it was not definite that the information regarding the client's possession of a large amount of cash would be provided to the prosecutor, and that it was not a complete confession to the charged crimes, the information was not incriminating for Fifth Amendment purposes. *Lefcourt*, 125 F.3d at 86-88. This fundamentally misconstrues the broad protection provided by the Fifth Amendment. *See, e.g., Hoffman v. United States*, 341 U.S. 479, 486 (1951) (Fifth Amendment privilege covers "not only . . . answers that would in themselves support a conviction under a federal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime").

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE SECOND CIRCUIT'S DETERMINATION THAT LEFCOURT ACTED "UNREASONABLY" BY SEEKING COURT GUIDANCE CREATES AN INTOLERABLE ETHICAL DILEMMA FOR ATTORNEYS WHO RECEIVE CASH PAYMENTS.

The determination of the court below that petitioner was unreasonable as a matter of law in not disclosing client identifying information represents a misunderstanding, and lack of appreciation, of an attorney's professional and ethical mandates.

In *Goldberger*, 935 F.2d at 505, the Second Circuit held that, "absent special circumstances," identifying a client on a Form 8300 does not involve the disclosure of attorney-client privileged information. *Goldberger* did not elaborate on what constitutes "special circumstances." Two years later the Second Circuit acknowledged that "what they are remains as enigmatic as the smile that Leonardo Da Vinci left us on the face of the Mona Lisa." *Vingelli*, 992 F.2d at 450 (2d Cir. 1993). *See also Blackman*, 72 F.3d at 1425-26 (declining to define "extraordinary circumstances"); *United States v. Leventhal*, 961 F.2d at 940 (11th Cir. 1992) (recognizing exception for "extraordinary circumstances" without defining such circumstances).

A number of district courts have agreed with this characterization, and have suggested that the parameters of the "special circumstances" exception are so unclear that, when information is sought that could potentially involve the disclosure of privileged information, seeking recourse to the courts is both necessary and proper. *See, e.g., Gertner*, 873 F.

Supp. at 737 (D. Mass); *United States v. Hirschhorn*, Civ. No. 94-651, 1995 WL 411225 (S.D. Fla. 1995); *United States v. Monnat*, 853 F. Supp. 1301, *modified*, 853 F. Supp. 1304 (D. Kan. 1994).

In his affidavit to the IRS which accompanied the incomplete Form 8300 in question, Lefcourt explained that he was withholding the identity of the client because it was protected by the attorney-client privilege, the Fifth and Sixth Amendments, comparable state provisions, and the Code of Professional Responsibility. He expected that if the IRS wanted the information he omitted from the form, it would bring an enforcement action under 26 U.S.C. §§ 7402(b) and 7604(a), as it did in *Goldberger* and *Gertner*. He expected, reasonably, that the proper forum for a determination of the *bona fides* of his claim would be a court of law. For this — with hindsight mistaken — belief, he has been penalized $25,000.

In this case, the Second Circuit held that not only was the information at issue not privileged because there was no "legal advice exception" in Second Circuit law, although no case had directly so held, but that this principle was so firmly established in the Second Circuit when Lefcourt filed the Form 8300 that Lefcourt had no reasonable basis for failing to provide the information required on the form.

The Second Circuit's decision raises three interrelated and important questions. First, since the Second and other circuits, *Goldberger*, 935 F.2d at 506 (2d Cir. 1991); *Sindel*, 53 F.3d at 876 (8th Cir. 1995); *Leventhal*, 961 F.2d at 940-41 (11th Cir. 1992), had previously acknowledged that "special circumstances" could preclude the disclosure of potentially incriminating information on a Form 8300, but had not defined those circumstances, was it reasonable for an attorney to seek guidance from the court, rather than risk a breach of the attorney-client privilege?

Second, was the rejection of the "legal advice exception" so firmly established as law, despite the contrary views of the First, Ninth and Tenth Circuits, *Anderson*, 906 F.2d at 1488-89, 1492 (10th Cir. 1990), *Strahl*, 590 F.2d at 11 (1st Cir. 1978), and *Baird*, 279 F.2d at 633 (9th Cir. 1960), that it was unreasonable for an attorney to refuse to immediately acquiesce to the IRS's demands and to instead seek guidance from the court?

And third, assuming that the "legal advice exception" had been clearly rejected by the Second Circuit, since it had been accepted by other circuits and since this Court had not definitively resolved the issue, was it unreasonable for an attorney to seek a judicial determination of his obligations before disclosing information which would harm the client? Put another way, is a lawyer required to acquiesce to a demand by the IRS, a federal nationwide agency, for client-identification information because the law in her circuit requires the information when disclosure of the information might be prohibited in other circuits and the issue has not been resolved by this Court?

The Second Circuit, in finding that Lefcourt did not act "reasonably," failed to give sufficient deference to the obligations of an attorney under applicable rules and opinions, both general and in relation to Form 8300, of numerous bar associations, including the National Association of Criminal Defense Lawyers (of which Lefcourt is an officer), which preclude voluntary disclosure by a lawyer of a client's confidences or secrets. *See*, *e.g.*, Podgor, E. *Form 8300: The Demise of Law as a Profession*, 5 Geo. J. Legal Ethics 485, 525-27 (1992); Washington State Bar Association Formal Op. 189 (1991) (client identity is "secret" which may not be disclosed by attorney on Form 8300 unless court order directs attorney to disclose it); Florida Ethics Opinion 92-5 (approved by the Board of Governors at 12/93 meeting) (if attorney determines information sought by Form 8300 is covered by attorney-client

privilege, absent the client's consent, the attorney should withhold the information until, and unless, a court subsequently orders the attorney to make the disclosure); State Bar of Wisconsin Formal Opinion No. E-90-3 (April 2, 1990) (absent client consent, attorney should not reveal information sought by Form 8300 and, in the event the attorney is ordered by a court to reveal the information, the attorney may consider a technical contempt to obtain appellate review of the order); Chicago Bar Association Ethics Opinion 86-2 (May 1988) (attorney should not disclose identity of client on Form 8300 or circumstances surrounding payment of fee, where client's control of significant funds could be used against the client as evidence of drug dealing or tax evasion and client does not consent to the disclosure); *See also Code of Professional Responsibility* DR 4-101.

The Court apparently rejected the underlying rationale for these bar association rules: namely, that the attorney's self-interest and the interest of the client may be in conflict, and that a decision inducing the attorney to take the "easy" way and disclose the client's secrets exacerbates the conflict. *See* Lawyer's Code of Professional Responsibility DR 4-101(b)(3), 22 NYCRR 1200.19(b)(3) (precluding a lawyer from knowingly using "a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure") and Model Rules of Professional Conduct Rule 1.8(b) ("lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation").[6] *Cf. United States v. Levy*, 25 F.3d 146 (2d Cir. 1994) (conviction reversed since, *inter alia*, attorney compromised client's defense because of self-interest).

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6. Mr. Lefcourt practiced in New York City, a jurisdiction which follows the Code of Professional Responsibility.

Since the IRS statute and its accompanying regulations at issue here may well mandate that the attorney engage in unethical, or at least ethically questionable, conduct under existing standards, for an attorney to await an order from the court before disclosing the information is not only "reasonable," but entirely proper. Ethical considerations may be trumped by acts of Congress, *see Caplin & Drysdale v. United States*, 491 U.S. 67 (1989), but before an attorney can be made to divulge what the attorney reasonably believes is a "secret,"[7] it is not only reasonable, it is essential, to secure a ruling from a court.

Under the decision in this case, an attorney can only guess at what the "special circumstances" of *Goldberger* or *Leventhal* or *Blackman* or *Sindel* may be, and must either divulge the information or be heavily penalized should she guess wrong. No attorney can assume it is "reasonable" to withhold any fee information, even if she believes that a court would find the information to be privileged, without assuming the risk of incurring a substantial penalty. While an attorney in the Second Circuit may have a good idea of what her obligations are, an attorney in, for instance, the Eighth Circuit may be hit with a draconian penalty for seeking a judicial ruling. Such a situation, in which attorneys may have different obligations to the IRS based on the circuit in which they practice, is offensive to the rule of law and the orderly and fair administration of justice.

The Second Circuit's decision in this case, which places the interest of the lawyer in conflict with the interest of the client, undermines important ethical principles and conflicts with

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7. "Secret" is defined in the Code of Professional Responsibility as information that is not protected by the attorney-client privilege but that is "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A).

numerous ethical rulings. Its significance to attorneys throughout the country mandates certiorari so that this Court can provide guidance to attorneys as to their obligations and establish a uniform standard for attorneys as how to comply with the dictates of § 6050I.

III.

THE COURT SHOULD GRANT CERTIORARI TO DECIDE THE IMPORTANT QUESTION OF WHETHER THE HEIGHTENED *MENS REA* REQUIREMENT ESTABLISHED BY THIS COURT IN *CHEEK v. UNITED STATES* SHOULD BE NECESSARY BEFORE IMPOSITION OF A PUNITIVE "CIVIL" PENALTY.

A. The Heightened *Mens Rea* Requirement of *Cheek v. United States* Should Be Applied When the Penalty Imposed is Punitive Even If It is Called Civil.

In *Cheek v. United States*, 498 U.S. 192 (1991), this Court held that a criminal defendant could not be convicted of a tax crime if he had a good faith belief that his action did not violate the law. In this case, there was never any contention that petitioner Lefcourt acted other than in a good faith belief that his failure to file a complete Form 8300 was legally justified. The Court of Appeals applied an objective test of reasonableness and, based on its own analysis of Second Circuit jurisprudence in this area, reached the conclusion that what it found was Lefcourt's erroneous view of the law (the same view as the *Gertner* court) was not objectively reasonable and affirmed the district court grant of summary judgment to the government. *Lefcourt*, 125 F.3d at 82-89. By doing so, the court deprived Lefcourt of the protection of *Cheek* and his constitutional right to a jury trial on the issue of reasonableness. *Cheek*, 498 U.S. at 203; U.S. Const., Article VII; *see also Finley v.*

United States, 123 F.3d 1342, 1346-48 (10th Cir. 1997) (*en banc*).

The court reasoned that since the fine imposed on Lefcourt was "only a civil penalty," the "heightened mens rea" standard of *Cheek* did not apply. This was error. As this Court has ruled, some civil penalties are so punitive that they may not be imposed without heightened constitutional protection. *Hudson v. United States*, 118 S. Ct. 488 (Dec. 10, 1997); *Austin v. United States*, 509 U.S. 602, 625 (1993); *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 778-85 (1994); *United States v. Ward*, 448 U.S. 242, 248-52 (1980).

26 U.S.C. § 6721(e), the penalty section involved here, imposes enhanced penalties for 26 U.S.C. § 6050I violations due to "intentional disregard" of the filing requirement. Although nominally a civil statute, § 6721(e) is purely punitive and unlike most civil tax penalties serves no revenue collection purposes. *Compare* 26 U.S.C. §§ 6651 and 6653(b) (based on a percentage of the underlying tax deficiency) and 26 U.S.C. § 6651 (designed merely to ensure that the government can recover taxes already withheld on its behalf). Under § 6721(e), the failure to correctly file a § 6050I disclosure form, if due to "intentional disregard," triggers a *minimum* penalty of $25,000 — without regard to whether the incomplete filing resulted in a tax deficiency, and irrespective of the amount of cash involved. In addition, the $250,000 limitation that ordinarily applies to § 6721 penalties does not apply to an "intentional disregard" penalty imposed under subsection (e).

In affirming the grant of summary judgment to the government and ruling that petitioner Lefcourt's good faith belief in the legality of his conduct was no defense to the imposition of the severe penalty, the Second Circuit took a narrow view of the scope of the heightened *mens rea* requirement

of *Cheek* and explicitly limited it to criminal tax cases. *Lefcourt*, 125 F.3d at 82-83. This ruling is in direct conflict with the law of the Ninth Circuit and the Tax Court.

Those two federal courts have applied the *Cheek* standard to civil tax cases. In *Richey v. United States*, 9 F.3d 1407 (9th Cir. 1993), the court held that "willful or intentional disregard," for purposes of determining the applicability of a civil tax penalty authorized by 26 U.S.C. § 6694(b)(2) for an understatement of tax due to willful or intentional disregard of rules or regulations, requires a specific intent to violate a known legal duty. 9 F.3d at 1412-13 (citing *Cheek*, 498 U.S. at 201). Thus, the Court held that a good faith belief that the tax returns were proper was an absolute defense to the penalty, regardless of whether such a belief was objectively reasonable. *Id.* at 1413.

Similarly, in *Robinson v. United States*, 95-1 USTC P 50, 222, 1995 WL 322722 (M.D. Fla. 1995), the district court (construing "intentional disregard" under 26 U.S.C. § 6652(a)(3), which imposes a similar type civil tax penalty) applied the *Cheek* standard in a civil context. After noting that it was "unaware of any decision specifically defining the standard for . . . intentional disregard," *id.* at 3, the Court found that it was analogous to the meaning of "willfulness" as the term is used in criminal tax statutes. *Id.* The court "conclude[d] that a taxpayer has not intentionally disregarded a filing requirement if he truly believes that the filing is not required." *Id.* (citing *Cheek*).

Thus, there is a clear conflict between the Second and at least the Ninth Circuit as to whether the application of *Cheek* should be limited to criminal cases.

B. Under the Approach Set Forth in *Hudson v. United States* the Penalty is Punitive.

Under the approach recently set forth by this Court in *Hudson v. United States*, 118 S. Ct. 488 (relying on analyses previously adopted in *Ward*, 448 U.S. 242, 248 (1980), and *Kennedy v. Mendozo-Martinez*, 372 U.S. 144, 168-69 (1963)), there is the " 'clearest proof' " (*Hudson*, 118 S. Ct. at 496) that the 28 U.S.C. § 6721(e) penalty is a "criminal punishment." The statute fits at least five of the seven factors enumerated in *Kennedy*, 372 U.S. at 168-69.

First, fines, penalties and forfeitures "ha[ve] historically been regarded as a punishment." *Kennedy*, 372 U.S. at 168. *See, e.g., Kurth Ranch*, 511 U.S. at 779. Moreover, historically, such a large penalty, unrelated to revenue loss, has been deemed consistent with a punitive purpose. *See, e.g., Kurth Ranch*, 511 U.S. at 779-81; *United States v. Constantine*, 296 U.S. 287, 293-95 (1935); *Helwig v. United States*, 188 U.S. 605, 610-13 (1903).

Second, the penalty "comes into play only on a finding of scienter." *Kennedy*, 372 U.S. at 168. Specifically, imposition of the penalty requires a finding of "intentional disregard." 26 U.S.C. § 6721(e).

Third, "its operation will promote the traditional aims of punishment — retribution and deterrence." *Kennedy*, 372 U.S. at 168. Indeed, the legislative history for 26 U.S.C. § 6721(e), the penalty provision applicable here, specifically states that the reason for the higher penalties — without caps — in cases where there is an intentional disregard of the filing requirements, is to ensure that people comply with the filing requirements. Congress was concerned that if the penalties were not high enough, people would choose to pay the maximum penalty as

a " 'cost of doing business' where it is less than the cost of compliance would be." H.R. Rep. 247, 101st Cong., 1st Sess., at 2854 (1989); Appendix at 53a.

Fourth, "the behavior to which it applies is already a crime." *Kennedy*, 372 U.S. at 168. Indeed, 26 U.S.C. § 7203, the criminal provision covering the willful failure to file or to provide required information to the Internal Revenue Service, specifically provides, as amended in 1990 (Pub. Law 101-647), that a willful violation of 26 U.S.C. § 6050I is a crime punishable by five years imprisonment (whereby a willful violation of any other Title 26 filing requirement is only a misdemeanor). *See also Goldberger*, 935 F.2d at 506 (failure to comply with the reporting requirements of 26 U.S.C. § 6050I constitutes a crime under various statutes).

Fifth, there is no "alternative purpose assigned" (*Kennedy*, 372 U.S. at 168-69) to this statute other than to deter and punish. This consideration often arises when a statute attempts to label a penalty as a tax. *See, e.g., Kurth Ranch*, 114 S. Ct. 1937 (Montana's drug tax); *Constantine*, 296 U.S. 287 (special excise tax); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (Child Labor Tax Law). In contrast to those situations, the drafters of 26 U.S.C. § 6721(e) made no attempt whatsoever to mask the fact that this is intended to be a penalty, as is reflected in the title of this subsection: "Penalty in case of intentional disregard."[8]

For all of these reasons, under the analyses set forth in *Hudson* and *Kennedy*, the penalty imposed by 26 U.S.C. § 6721(e) is clearly a punishment, and the Second Circuit should have recognized it as such and applied the *Cheek* standard.

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8. Since there is no "alternative purpose" assigned to this statute, the last criterion, whether the penalty appears excessive in relation to the alternative purpose assigned (*Kennedy*, 372 U.S. at 169), is not applicable here.

Certiorari should be granted to determine the important issue relating to the administration of the federal tax laws and to resolve the conflict between circuits as to whether the heightened *mens rea* protection of *Cheek* should apply before the imposition of punitive penalties in a civil proceeding.[9]

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9. Alternatively, this Court might choose to remand this case to the Second Circuit for reconsideration in light of *Hudson*, 118 S. Ct. 488.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

LAWRENCE S. GOLDMAN
Counsel of Record
ELIZABETH M. JOHNSON
GWEN M. SCHOENFELD
ANASTASIA G. MARGARIS
GOLDMAN & HAFETZ
500 Fifth Avenue
New York, New York 10110
(212) 997-7400

NATHAN Z. DERSHOWITZ
DERSHOWITZ & EIGER, P.C.
350 Fifth Avenue
New York, New York 10118
(212) 967-0667

MARTIN G. WEINBERG
OTERI, WEINBERG & LAWSON
Statler Building
20 Park Plaza/Suite 905
Boston, Massachusetts 02116
(617) 227-3700

LAWRENCE S. HORN
ROBERT J. ALTER
SILLS CUMMIS ZUCKERMAN
RADIN TISCHMAN EPSTEIN
& GROSS, P.A.
One Riverfront Plaza
Newark, New Jersey 07102
(201) 643-7000

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED SEPTEMBER 10, 1997

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 871—August Term 1996

(Argued January 27, 1997 Decided September 10, 1997)

Docket No. 96-6151

GERALD B. LEFCOURT, P.C.,

Plaintiff-Appellant,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

WALKER, PARKER, and HEANEY,*

Circuit Judges.

Plaintiff-appellant Gerald B. Lefcourt, P.C. appeals from the May 16, 1996 judgment entered in the United States District Court for the Southern District of New York (Patterson,

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* The Honorable Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

J.), granting the United States' motion for summary judgment and denying plaintiff's cross-motion for summary judgment in plaintiff's tax refund action. In so doing, the district court affirmed the Internal Revenue Service's imposition of a $25,000 penalty on the ground that Lefcourt had intentionally failed to comply with certain tax reporting requirements set forth in 26 U.S.C. § 6050I and that the law firm had not established "reasonable cause" for doing so.

Affirmed.

LAWRENCE S. GOLDMAN, ESQ. New York, N.Y. (Elizabeth M. Johnson, Goldman & Hafetz, New York, N.Y.; Martin G. Weinberg, Oteri, Weinberg & Lawson, Boston, Massachusetts; Lawrence S. Horn, Robert J. Alter, Stills Cummis Zuckerman Radin Tischman Epstein & Gross, P.A., Newark, New Jersey; Gerald B. Lefcourt, Sheryl E. Reich, Lefcourt & Dratel, P.C., New York, New York, of Counsel), *for Plaintiff-Appellant.*

NEIL M. CORWIN, ESQ. Asst. U.S. Attorney (Mary Jo White, United States Attorney for the Southern District of New York, of Counsel; Kay K. Gardiner, New York, New York, on the brief), *for Defendant-Appellee.*

(Robert J. Jossen, Shereff, Friedman, Hoffman & Goodman, LLP, New York, New York; John H. Doyle III, Anderson Kill & Olick, P.C., New York, New York; Nathan Z. Dershowitz, Dershowitz & Eiger, New York, New York; Jeremy Guttman, Esq., New York, New York;

Appendix A

Martin Adelman, Esq., New York, New York), *for Amici Curiae National Association of Criminal Defense Lawyers, New York Counsel of Defense Lawyers, New York Criminal Bar Association and New York State Association of Criminal Defense Lawyers.*

WALKER, *Circuit Judge*:

Plaintiff-appellant Gerald B. Lefcourt, P.C. ("Lefcourt" or "the law firm") appeals from the May 16, 1996 judgment entered in the United States District Court for the Southern District of New York (Robert P. Patterson, Jr., *District Judge*), granting the United States' motion for summary judgment and denying plaintiff's cross-motion for summary judgment in plaintiff's tax refund action. In so doing, the district court affirmed the imposition of a $25,000 penalty by the Internal Revenue Service ("IRS") on the ground that Lefcourt had intentionally failed to comply with certain reporting requirements set forth in 26 U.S.C. § 6050I and that the law firm had not established "reasonable cause" for doing so.

Lefcourt has advanced a number of reasons for failing to file the information required by § 6050I, all of which are animated by a concern for the sensitive relationship that exists between attorney and client. We recognize the importance of this privilege and the impulse of attorneys to defend it vigorously, as Lefcourt has done here. However, for the following reasons, we affirm the judgment of the district court.

Appendix A

BACKGROUND

Title 26, section 6050I, of the United States Code requires "[a]ny person . . . engaged in a trade or business" who "in the course of such trade or business, receives more than $10,000 in cash . . ." to report to the IRS the person from whom the cash was received, the amount of cash received, the date and nature of the transaction, and "such other information as the Secretary may prescribe." 26 U.S.C. § 6050I(a), (b). Form 8300 is the form used to report such a transaction.

During the summer of 1993, Lefcourt, a law firm specializing in criminal defense work, undertook the representation of a client facing federal drug and money laundering charges. The client paid Lefcourt over $10,000 in cash for legal services. On July 9, 1993, the law firm submitted a Form 8300 to the IRS, stating that it had received in excess of $10,000, and particularizing the date of the payment. The firm, however, deliberately omitted the payor's name. In doing so, Gerald Lefcourt, the law firm's name partner, attached to the Form 8300 an affidavit asserting that revealing the client-identifying information called for by § 6050I would prejudice the interests of a client whom the law firm was actively representing and that the confidentiality of the information was protected by the Fifth and Sixth Amendments of the Constitution and by the Lawyers' Code of Professional Responsibility.

On December 14, 1993, the IRS served the law firm with a Notice of Proposed Penalties under 26 U.S.C. § 6721(e), which allows for the imposition of a penalty where "intentional disregard" of § 6050I's reporting requirements is established. Over the following four months, Lefcourt initiated numerous correspondences with the IRS to request a conference with the IRS's Office of Appeals concerning the pro-

posed penalty, and to explain the basis for its failure to provide the name of its client on the Form 8300. The overtures resulted in an apparently unsuccessful pre-settlement conference between Lefcourt and the IRS on April 12, 1994: on August 8, 1994 the IRS assessed the law firm a $25,000 penalty pursuant to § 6721.

In September of 1994, the law firm paid the full amount of the assessed penalty and, on that date, claimed a refund for the same amount. The following day, the IRS notified Lefcourt that no refund would be granted. On December 6, 1994, Lefcourt brought this refund action in the district court pursuant to 28 U.S.C. § 1346(a)(1).

In May 1995, while the case was pending before the district court, the law firm filed an amended Form 8300 that provided the name of the client that had previously been omitted from the form that was filed on July 9, 1993.

Both parties moved for summary judgment before the district court. In an opinion and order dated May 13, 1996, the district court granted the government's motion and denied Lefcourt's, reasoning principally that Lefcourt intentionally disregarded § 6050I's filing requirements, thereby triggering the penalty for willful noncompliance set forth in 26 U.S.C. § 6721, and that the law firm failed to establish that it acted with the reasonable cause required to qualify for the mandatory waiver of penalties set forth in 26 U.S.C. § 6724. This appeal followed.

DISCUSSION

We review *de novo* a district court's decision to grant summary judgment, using the same standard applied by the district court. *See Catlin v. Sobol*, 93 F.3d 1112, 1116 (2d Cir. 1996). Summary judgment may not be granted unless the

court determines that there are no genuine issues of material fact in dispute and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In determining whether summary judgment was appropriate, "we resolve all ambiguities and draw all reasonable inferences against the moving party." *Skubel v. Fuoroli*, 113 F.3d 330, 334 (2d Cir. 1997).

I. *Intentional Disregard*

We first turn to the question of whether, by declining to provide its client's name as called for by Form 8300, the law firm acted with "intentional disregard" of § 6050I's filing requirements.

As noted earlier, 26 U.S.C. § 6050I requires "[a]ny person . . . engaged in a trade or business" who "in the course of such trade or business, receives more than $10,000 in cash . . ." to file a report with the IRS that specifies the person from whom the cash was received, the amount of cash received, the date and nature of the transaction, and "such other information as the Secretary may prescribe." 26 U.S.C. § 6050I(a), (b). When a party is deemed to have failed to file the information required by § 6050I because of "intentional disregard of the filing requirement," the Internal Revenue Code provides that the party shall be fined the greater of $25,000 or the amount of cash received in the transaction. *See* 26 U.S.C. § 6721(e)(2)(C). Title 26, section 301.6721-1(f)(2)(ii), of the Code of Federal Regulations indicates that "a failure is due to intentional disregard if it is a knowing or willful . . . [f]ailure to include correct information."

The district court found that the $25,000 penalty was properly assessed against Lefcourt because the government satisfied its burden of demonstrating that the law firm acted

with intentional disregard of its legal obligations—that is, that "[p]laintiff knew what § 6050I required and voluntarily, consciously, and intentionally failed to comply." *Gerald B. Lefcourt, P.C. v. United States*, 94 Civ. 8813, 1996 WL 252363, at *6 (S.D.N.Y. May 14, 1996).

On appeal, Lefcourt argues that the district court applied the incorrect *mens rea* standard to § 6721's enhanced penalty provision. Lefcourt takes the position that under § 6721, a good faith belief in the legality of one's conduct—even where that belief later proves to be mistaken or unreasonable—precludes a finding of intentional disregard. Put another way, Lefcourt argues that one must be aware of the law's requirements in order to disregard them, and thus, a subjective good faith belief that one's conduct is lawful precludes the imposition of the penalty. Lefcourt suggests that Congress chose to adopt this heightened "bad faith" requirement because the penalties provided for by the statute are severe.

The principal case Lefcourt points to is *Cheek v. United States*, 498 U.S. 192 (1991), which involved the criminal prosecution of a defendant who failed to pay federal income taxes for several years on the basis of his (erroneous) view that, under the tax laws, wages did not constitute taxable income. The Supreme Court held that in order to convict a defendant of criminal tax evasion in violation of 26 U.S.C. § 7201, it is not sufficient for the government to show only that the defendant acted voluntarily, as opposed to by accident or mistake. The Court held that the government also must prove willfulness, which, "as construed by . . . prior tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated this duty." *Id.* at 201. A defendant's genuinely held—albeit erroneous or even unreasonable—belief in the legality of his

conduct is thus a defense to a prosection for willful tax evasion. *Id.* at 203.

Lefcourt's reliance on *Cheek*'s willfulness standard is unavailing. *Cheek* was a criminal case, and we are persuaded that its rationale does not apply in the context of the civil tax penalties at issue here. Describing the genesis of the "special treatment of criminal tax offenses," *id.* at 200, the Court in *Cheek* explained that Congress did not intend that a taxpayer "should become a criminal" based on a "bona fide misunderstanding as to his liability," *id.* (quoting *United States v. Murdock*, 290 U.S. 389, 396 (1933)). Accordingly, "Congress has . . . softened the impact of the common-law presumption [that every person knows the law] by making specific intent to violate the law an element of certain criminal tax offenses." *Id.* The concern that an individual taxpayer unfamiliar with the nuances of the tax code might confront a felony conviction upon a nonpayment of taxes is not present in this context, where the filer faces only a civil penalty. *Cf. Kalb v. United States*, 505 F.2d 506, 510 (2d Cir. 1974) (constitutional protections afforded criminal defendants unnecessary where "willful" violation of 26 U.S.C. § 6672 is asserted because penalty is civil, rather than criminal).

Cases construing analogous civil penalty provisions in the tax code and, in particular, provisions requiring a showing of willfulness also persuade us that no heightened *mens rea* is required in this context. Courts considering such provisions define willfulness in terms of "voluntary, conscious, and intentional" conduct. *See, e.g., Kalb*, 505 F.2d at 511 (internal quotations omitted); *Denbo v. United States*, 988 F.2d 1029, 1033 & n.3 (10th Cir. 1993) (citing cases). Indeed, as this circuit has explained before *Cheek* in the slightly different context of 26 U.S.C. § 6672 (which provides for penalties upon willful failure to collect withholding tax), an "individual's bad purpose or evil motive in failing to collect

and pay the taxes 'properly play[s] no part in the civil definition of willfulness.' " *Hochstein v. United States*, 900 F.2d 543, 548 (2d Cir. 1990) (quoting *Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir. 1970)); *see also Domanus v. United States*, 961 F.2d 1323, 1325-26 (7th Cir. 1992).

Section 6721 does not use the term "willful"; it uses the term "intentional disregard." But 26 C.F.R. § 301.6721-1(f)(2)(ii) defines "intentional disregard" as synonymous with "willfulness." Thus, in our view, the "intentional disregard" set forth in § 6721's penalty provision means conduct that is willful, a term which in this context requires only that a party act voluntarily in withholding requested information, rather than accidentally or unconsciously. Once it is determined, as it was here, that the failure to disclose client-identifying information was done purposefully, rather than inadvertently, it is irrelevant that the filer may have believed he was legally justified in withholding such information. The only question that remains is whether the law required its disclosure.

As it is uncontested that Lefcourt was aware that Form 8300 asked for its client's identity and nonetheless chose to refuse to provide the name, there is no dispute that Lefcourt acted voluntarily. We thus agree with the district court that, as a matter of law, Lefcourt's failure to disclose the client-identifying information was willful and in "intentional disregard" of the law firm's obligation. *Cf. Skouras v. United States*, 26 F.3d 13, 14 (2d Cir. 1994) (willfulness may be decided at summary judgment stage).

II. *Mandatory Waiver*

Lefcourt argues that even if the law firm acted with intentional disregard of § 6050I's reporting requirements, it was entitled to the automatic penalty waiver under 26 U.S.C.

§ 6724. That section sets forth the waiver rules that apply to the penalties for failure to comply with certain IRS reporting requirements. It provides that "[n]o penalty shall be imposed under this part with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect." 26 U.S.C. § 6724(a). The burden of showing reasonable cause is on the party seeking the waiver. *See McMahan v. Commissioner*, 114 F.3d 366, 368 (2d Cir. 1997). We hold that Lefcourt was not entitled to the waiver because the law firm failed to establish that it had an objectively reasonable argument for failing to disclose its client's identity.

Although we have found no cases discussing the phrase "due to reasonable cause and not to willful neglect" within the meaning of § 6724, the Supreme Court in *United States v. Boyle*, 469 U.S. 241, 242 (1985), considered the meaning of a virtually identical phrase used in 26 U.S.C. § 6651(a)(1), which states the penalty for the late filing of a tax return. In that context, the Court stated that " 'willful neglect' may be read as meaning a conscious, intentional failure or reckless indifference." *Boyle*, 469 U.S. at 245. However, we do not believe that *Boyle*'s definition applies to § 6724's waiver provision. In *Boyle*, the Supreme Court explicitly limited its definition to the term "willful neglect" as used in § 6651. *See Boyle*, 469 U.S. at 245. More to the point, if *Boyle*'s definition were applied in this context, the circumstances that would trigger a penalty would be such as to negate the waiver provision in the first place because once a willful violation under § 6721 were found, a filer would never be entitled to a waiver under § 6724. Put another way, a filer found to have acted in a "voluntary, conscious, and intentional" manner so as to be subject to the penalty would also necessarily be found to have acted with "willful neglect" as defined in *Boyle*—that is, consciously and intentionally, *see id.*—and would thus be ineligible for the waiver. We do not

believe that Congress would create such a phantom waiver clause. Rather, we believe that "reasonable cause and not willful neglect" must refer not simply to whether the taxpayer acted voluntarily in the sense of acting consciously, but also to whether the filer's reason for so acting was objectively reasonable under the circumstances.

This interpretation of the meaning of the phrase "reasonable cause and not willful neglect" is supported by the definition of the term "reasonable cause" in 26 C.F.R. § 301.6724-1. To be entitled to the reasonable cause waiver, the filer must satisfy several criteria. Relevant here is the objective standard found in the regulation's requirement that the filer must have acted in a responsible manner by exercising reasonable care, "which is that standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations . . . ." 26 C.F.R. § 303.6724-1(d)(i).[1]

Further, we believe that the regulation's reference to reasonableness "under the circumstances in the course of its business" permits a court to consider specific relevant features of the filer's particular business in assessing whether the filer acted with reasonable care in intentionally disregarding his or her § 6050I obligations. Thus the appropriate inquiry in this case is whether the law firm's decision to withhold client-identifying information was consistent with the standard of care that a reasonably prudent attorney would use under the circumstances in the course of his or her business.

Preliminarily, we acknowledge that a reasonable attorney carefully attends to the attorney-client privilege. Not only is

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[1] The filer must also have undertaken significant steps to avoid or mitigate the failure, *see* 26 C.F.R. § 303.6724-1(d)(ii), and must establish that there are "significant mitigating factors with respect to the failure," 26 C.F.R. § 303.6724-1(a)(2)(i). Given our disposition of this case, we need not decide whether the firm satisfied these additional criterion.

the attorney bound to do so under the various codes of professional responsibility that govern the practice of law, *see e.g.* Deborah L. Rhode, *Professional Responsibility* 242-43 (1994); *Model Code of Professional Responsibility* DR 4-101 (1980), but also, to many attorneys, the privilege between attorney and client "is essential to enhancing frank and complete communication between attorney and client, which, in turn, promotes compliance with the law and facilitates the administration of justice." Brief of the Amici Curiae at 4.

Yet the attorney-client privilege, however important to our system of justice, is not a license for an attorney to act "unreasonably" in willfully failing to comply with clear federal law. Thus, in the context presented here, if a reasonable attorney would have no basis for concluding that nondisclosure of client-identifying information was justified under existing law, the attorney-client privilege cannot serve to excuse the imposition of a penalty under § 6721. Accordingly, we turn to Lefcourt's rationale for nondisclosure to determine whether it was objectively reasonable.

Lefcourt argued to the IRS and to the district court that under Second Circuit law the attorney-client privilege protects an attorney from disclosing the client-identifying information required under § 6050I in certain "special circumstances." The law firm contended that it did not submit the required information principally because it believed that a special circumstance might be found to exist where the completed Form 8300 would provide the government with evidence of its client's unexplained wealth—evidence that could incriminate the client in the same proceedings for which the client had retained the law firm. Lefcourt also referred to the fact that disclosure of the client's identity might lead eventually to Lefcourt's being called as a witness against the client, which would in turn result in the law

firm's disqualification.[2] *See* Letter from Lawrence S. Goldman and Martin G. Weinberg, Goldman & Hafetz, to Eugene D. Alexander, District Director, Internal Revenue Service 16-17 (Jan. 7, 1994), *reprinted in* Joint Appendix on Appeal at 46-47; Affidavit of Gerald B. Lefcourt in Support of Plaintiff's Motion for Summary Judgment ¶ 9, *reprinted in* Joint Appendix on Appeal at 262.

Our assessment of the reasonableness of the law firm's claimed "special circumstances" begins with *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir. 1991). In *Goldberger*, upon a law firm's refusal to file a completed Form 8300, the IRS issued a summons, subsequently enforced by the district court, directing the firm to produce its clients' names. On appeal, the attorneys argued that § 6050I's reporting requirements were unconstitutional and violative of the attorney-client privilege. We rejected both claims and affirmed the district court's order directing disclosure of the client-identifying information.

With respect to the attorney-client privilege, we held that "absent special circumstances . . . the identification in Form 8300 of respondents' clients who make substantial cash payments is not a disclosure of privileged information." *Goldberger*, 935 F.2d at 505. Thus, we suggested that although a client's identity is generally not privileged, there might be "special circumstances" where such information would be protected from disclosure.[3]

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[2] On appeal, Lefcourt does not press the reasonableness of this argument.

[3] We agree with the government that language in *Goldberger* can be read to suggest that Congressional enactment of § 6050I abrogates any claim of attorney-client privilege with respect to a Form 8300 filing. *See Goldberger*, 935 F.2d at 505 (noting that the attorney-client privilege would "surely" yield where it "collides head on with a federal statute"). Under this view, even if a court found special circumstances to exist whereby the provision of client identifying information would implicate the attorney-client privilege, such privilege would nonetheless give way to § 6050I's reporting requirements. However,

Lefcourt relies on *Goldberger*'s reference to "special circumstances" to support the proposition that in this circuit, there are occasions when an attorney's noncompliance with § 6050I will be excused. The law firm argues further that *Goldberger* left open the possibility that one such special circumstance could be where the disclosure of the client-identifying information would "prejudice [the client's] interest and undermine [the law firm's] ability to provide effective representation." Affidavit of Gerald B. Lefcourt, filed with IRS Form 8300, *reprinted in* Joint Appendix on Appeal at 284. We do not accept that reading of *Goldberger* and the cases on which *Goldberger* relied.

As a general rule, a client's identity and fee information are not privileged. *See In re Grand Jury Subpoena Served Upon John Doe, Esq.*, 781 F.2d 238, 247 (2d Cir. 1989) (in banc). Although the court in *Goldberger* did not elaborate on the meaning of the special circumstances exception to the rule, it offered some guidance as to what might and what might not constitute such a circumstance. Significant to this case, the court expressly rejected the essence of Lefcourt's claim when it stated that the "asserted possibility" that a client may be incriminated by disclosure does not constitute a special circumstance. *See* 935 F.2d at 505.

In so doing, the court cited *In re Grand Jury Subpoena Duces Tecum Served Upon Gerald L. Shargel*, 742 F.2d 61 (2d Cir. 1984), which involved a defense attorney's appeal of a district court order denying a motion to quash a subpoena issued by a grand jury that sought to compel the attorney to

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this language was dicta in *Goldberger* because the court found clearly that no special circumstances had been presented. *See id.*; *cf. Vingelli v. United States*, 992 F.2d 449, 453 (2d Cir. 1993) (post-*Goldberger* decision recognizing special circumstances in which client-identity might be protected from compelled disclosure to a federal grand jury). We now have no occasion to decide whether, as *Goldberger* suggested, Congress intended to override the attorney-client privilege in all cases.

produce records of money he had received from several clients who had been indicted for RICO violations. The government in *Shargel* admitted that the grand jury wanted the information as possible evidence that the defendants possessed unexplained wealth. *See id.* at 62. Shargel argued that disclosure of the information would violate the attorney-client privilege by incriminating his clients in the RICO case. The court unequivocally rejected this "incrimination rationale" that Lefcourt now claims provided a reasonable basis for its own noncompliance:

> We have consistently held that client identity and fee information are, absent special circumstances, not privileged. This result follows from defining the privilege to encompass only those confidential communications necessary to obtain informed legal advice. This definition, which focuses upon facilitating the role of the lawyer as a professional advisor and advocate, is to be distinguished from the so-called "incrimination rationale," which focuses upon whether the materials sought may be used as evidence against the client. While the attorney-client privilege historically arose at the same time as the privilege against self-incrimination, it was early established that the privileges had distinct policies and that the "point of honor"—the attorney's reluctance to incriminate his client—was not a valid reason to invoke the attorney-client privilege.

Shargel, 742 F.2d at 62-63 (citations and footnote omitted). The court thus held that "information is not protected by the privilege even though the client may strongly fear the effects of disclosure, including incrimination." *Id.* at 63.[4]

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[4] Lefcourt suggests without citation that *Shargel* may be distinguished on the ground that it involved a grand jury subpoena and not an IRS proceeding. Brief of Appeal of Gerald B. Lefcourt, P.C. at 21 n.11. Because the same rules of attorney-client privilege apply in either context—rules developed by federal

Goldberger and *Shargel*, read together, squarely reject the principal argument put forward by Lefcourt here: that possible or even likely client incrimination constitutes a special circumstance justifying nondisclosure. *See also Doe*, 781 F.2d at 247-48 (compelled disclosure of client-identity and fee information that is incriminating evidence of unexplained wealth does not, "absent special circumstances," violate the attorney-client privilege).

Lefcourt attempts to avoid the force of *Goldberger* and *Shargel* by arguing that its case presents a unique twist on the incrimination rationale because the incrimination would have occurred in the very case for which the funds triggering the obligation to file a Form 8300 were expended as legal fees. Lefcourt contends that the reasonableness of this argument should excuse its noncompliance with § 6050I. It is evident to us that the fact of current representation is a distinction without a difference, and Lefcourt offers no authoritative support for the view that the attorney-client privilege forbids compelling disclosure of incriminating client-identifying information in cases of ongoing representation but in no other cases. *Shargel* itself was a case that involved active representation and the government there sought the fee information to use as evidence of the clients' unexplained wealth in the same RICO prosecution for which Shargel had been retained. 742 F.2d at 62.[5]

The foregoing argument by Lefcourt has been characterized by courts as the "legal advice exception," which holds

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courts "in the light of reason and experience," Fed. R. Evid. 501—there is no basis for this distinction.

[5] In fact, *Shargel* arguably presents a *worse* case from a client's perspective than that presented here: in *Shargel*, there was no doubt that the information would be used against Shargel's clients, as that was the very purpose for which the grand jury sought it. In the present case, the information was sought by the IRS pursuant to a general reporting requirement. Whether the IRS would forward it to the U.S. Attorney for prosecutorial purposes was not a certainty.

client-identifying information privileged "where there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought." *In re Grand Jury Subpoena (Anderson)*, 906 F.2d 1485, 1488 (10th Cir. 1990). However, this exception (which has been described by another court as one of "questionable validity," *see Anderson*, 906 F.2d at 1488) has never once been accepted in this circuit. In fact, we all but categorically rejected it in *Vingelli v. United States*, 992 F.2d 449 (2d Cir. 1993), a case not cited by Lefcourt, where we took pains to distinguish the legal advice exception from the confidential communications exception that is recognized in this circuit. *Id.* at 452-53 (citing *Shargel*, 742 F.2d at 62-63).

Thus the law is clear, and was so when Lefcourt refused to file its completed Form 8300: to the extent that the legal advice exception exists in any jurisdiction, it plainly is not recognized as a special circumstance in this circuit. Lefcourt's argument that nondisclosure in this case was warranted under the attorney-client privilege because the client-identifying "information could be used against the client in the very case in which the Firm was engaged to provide criminal defense representation," Brief of Appeal of Gerald B. Lefcourt, P.C. at 3—a phrase that parrots the classic definition of the legal advice exception set forth in *Anderson*, 906 F.2d at 1488—was not objectively reasonable.

Lefcourt next argues that incrimination in the very case for which the attorney was retained implicates (or could reasonably be thought to implicate) the so-called "direct linkage" special circumstance that this court mentioned in *Goldberger*, 935 F.2d at 505. *See* Brief of Appeal of Gerald B. Lefcourt, P.C. at 25. If there is such an exception in this circuit outside of the Fifth Amendment context—a matter we do not decide—it must be derived from *Marchetti v. United States*, 390 U.S. 39, 48-49 (1968), a case where the Supreme

Court held that the Fifth Amendment privilege against self-incrimination was a defense in a prosecution for failing to register as a gambler under the IRS's wagering tax provisions where the "direct and unmistakable consequence" of registration would be to implicate the party registering in the crime of gambling. The present case does not remotely resemble the facts of *Marchetti*, a case in which disclosure of the information provided the proof necessary to convict the filer of the crime of gambling—where the statutory filing requirement produced, in effect, a compelled confession of criminal activity. Here, in contrast, the client was not compelled to pay the law firm in cash, but rather did so voluntarily. *See Goldberger*, 935 F.2d at 504 ("To avoid disclosure under section 6050-I, they need only pay counsel in some manner other than with cash. The choice is theirs."). Furthermore, the disclosure that a client consulted an attorney and paid that attorney in cash, although probative of unexplained wealth, does not link the defendant to a crime in the manner required by *Marchetti*. Rather, "seeking legal advice is as much a first step in demonstrating innocence as it is an admission of guilt." *Shargel*, 742 F.2d at 63 n.3. And, most significantly, we have explicitly rejected claims of attorney-client privilege where disclosure of fee information might provide the government with evidence of unexplained wealth in a criminal case. *See Doe*, 781 F.2d at 248 ("Fee information may be sought as evidence of unexplained wealth which may have been derived from criminal activity . . . . As a general rule . . . such information is not protected from disclosure by the attorney-client privilege."); *Shargel*, 742 F.2d at 63-64.

Lefcourt's final argument in defense of the reasonableness of its nondisclosure is that even if the Second Circuit does not consider it a special circumstance when disclosure would incriminate the client in the very case for which he or she

hired the law firm, at least one district court in another circuit has so held, and thus, the law firm's belief that nondisclosure might be excused was reasonable. Lefcourt refers to *United States v. Gertner*, 873 F. Supp. 729, 735-36 (D. Mass 1995), *aff'd on other grounds*, 65 F.3d 963 (1st Cir. 1995), in which a district court in the First Circuit denied the IRS's petition to enforce a summons against an attorney who had failed to provide the client-identifying information called for by Form 8300. In so doing, the district court relied on the legal advice exception to disclosure of client-identifying and fee information mentioned in *Anderson*, 906 F.2d at 1488, and on the direct linkage exception noted in *Goldberger*, 935 F.2d at 505—an exception, we note, that the district court held to be satisfied because of the "strong probability that disclosure would not only incriminate John Doe, but incriminate him in the very activity for which he sought legal advice," *Gertner*, 873 F. Supp. at 736.

To the extent that the holding in *Gertner* relies on the legal advice exception, it is contrary to the law of this circuit for the reasons we have explained, and Lefcourt's reliance on it was therefore unreasonable. To the extent that *Gertner* purports to rely on the so-called direct linkage exception noted in *Goldberger*, it is plain to us that the district court misread our precedent. Our cases have consistently rejected the notion that incrimination in an active case—a scenario characterized by the *Gertner* court as implicating both the legal advice exception and the direct linkage exception—is a special circumstance that renders client-identifying and fee information privileged.

Lefcourt relies on another case outside of this circuit, *United States v. Sindel*, 53 F.3d 874, 876 (8th Cir. 1995), in which, relying on *Goldberger*, the Eighth Circuit held that information requested by IRS Form 8300 is protected by the attorney-client privilege only if the facts present a special

circumstance. The court then conducted an *in camera* review of the allegedly privileged information and concluded that, with respect to one of the subpoenaed lawyer's clients, the information was entitled to protection from disclosure because it would have revealed a confidential communication between the client and the attorney. *Id.* This holding comports with Second Circuit law, which recognizes the confidential communication exception to the rule that client identity and fee information are not privileged. *See Vingelli*, 992 F.2d at 453. The Eighth Circuit's decision in *Sindel* thus in no way supports the reasonableness of Lefcourt's own nondisclosure.

Lefcourt does not rely on *Sindel* to support an argument that the confidential communication exception applies in this case. Rather, the law firm uses *Sindel* to support its broader contention that because special circumstances are on occasion found to exist, a wide range of arguments as to the existence of a special circumstance in a particular case is reasonable within the meaning of § 6724. *See* Brief of Appeal of Gerald B. Lefcourt, P.C. at 24. Whatever the worth of this dubious proposition as a general matter, it fails in a situation where there is authoritative precedent *rejecting* as a special circumstance the very same factors relied upon by an attorney with a duty to file a Form 8300—in this case, the possible incrimination of Lefcourt's client in an active case.

In sum, we conclude that Lefcourt had no reasonable basis for failing to provide the information required by § 6050I under the facts presented here. Although the contours of the special circumstance exception have not been exhaustively developed, no doubt due to the fact special circumstances are seldom found to exist, it is clear that there is no special circumstance in this circuit simply because the provision of client-identifying information could prejudice the client in the case for which legal fees are paid. *See Goldberger*, 935

F.2d at 505; *Doe*, 781 F.2d at 248; *Shargel*, 742 F.2d at 623-63; *cf. Vingelli*, 992 F.2d at 453. We believe that this legal principle is firmly established and was so when the incomplete Form 8300 was filed. Thus we conclude that Lefcourt did not exercise the "standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations" in asserting otherwise. 26 C.F.R. § 303.6724-1(d)(i).

We therefore agree with the district court that Lefcourt has not established "reasonable cause" for its willful noncompliance with § 6050I.

CONCLUSION

We have considered Lefcourt's remaining contentions, and find them to be without merit. We therefore affirm the judgment of the district court.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED MAY 13, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

94 Civ. 8813 (RPP)

GERALD B. LEFCOURT, P.C.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

* * *

OPINION AND ORDER

ROBERT P. PATTERSON, JR., U.S.D.J.

Plaintiff, Gerald B. Lefcourt, P.C. ("the Firm"), in this lawsuit for a tax refund, moves pursuant to Rule 56 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for an order that judgment be entered against the defendant in the amount of $25,000 together with attorney's fees, costs and interest as provided by law. Defendant, the United States of America ("the Government"), moves pursuant to Fed. R. Civ. P. 56 for an order dismissing plaintiff's tax refund suit. For the following reasons, plaintiff's motion is denied and defendant's motion is granted.

Appendix B

BACKGROUND

At all relevant times, Gerald B. Lefcourt ("Lefcourt") was the sole shareholder of the Firm, and the actions taken by the Firm were undertaken by him or at his specific request.[1] (Plaintiff's Statement of Facts Not in Dispute Pursuant to Local Rule 3(g) ("Pl.'s 3(g) Stmt.") 11.)

Prior to this action, Lefcourt participated in unsuccessful efforts to influence the Department of Justice (DOJ) regarding the validity and means of enforcement of 26 U.S.C. §6050I which requires anyone engaged in a trade or business who in the course of his trade or business receives more than $10,000 in cash in one transaction or two or more related transactions to report the transaction on a form to be prescribed by the Secretary of the Treasury identifying the date and nature of the transaction, the amount of cash received, and the identity of the payor of the fee. 26 U.S.C. §6050I. The Internal Revenue Service ("IRS")

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1. Lefcourt is currently a vice-president of the National Association of Criminal Defense Lawyers ("NACDL"). He is the founder and vice-president of the New York State Association of Criminal Defense Lawyers; a member of the American Bar Association House of Delegates; a past president of the New York Criminal Bar Association; and formerly Chair of the Association of the Bar of the City of New York's Criminal Advocacy Committee. He is also a member of the Commission of Judicial Nomination for the New York Court of Appeals. (Affidavit of Gerald B. Lefcourt sworn to on May 25, 1995 ("Lefcourt Aff.") ¶4.)

Lefcourt has served as the Chair of the New York State Bar Association's Committee on Legal Representation of the Indigent in the Criminal Process and as Chair of the Association of the Bar of the City of New York's Criminal Advocacy Committee. (*Id.* ¶6.)

Form 8300 (U8300 Forms) has become the form for reporting such transactions. Lefcourt assisted the National Association of Criminal Defense Lawyers (NACDL) in the drafting of proposed guidelines which would define circumstances in which attorneys could properly assert the attorney-client privilege and claim a right not to provide client-identifying information on a 8300 Form. (Affidavit of Gerald B. Lefcourt sworn to on May 25, 1995 ("Lefcourt Aff.") ¶¶ 23–24.)

On March 16, 1990, these proposed guidelines, pertaining to the provision of information on the 8300 Form and the enforcement of 26 U.S.C. §6050I, were sent to James Burton ("Burton") Deputy assistant Attorney General, Tax Division by Michael S. Ross, a representative of the American Bar Association. (Affidavit of Michael S. Ross sworn to on May 18, 1995 ("Ross Aff."), Ex. A.) In a letter dated September 7, 1990, Burton rejected adopting the proposed guidelines, but assured the American Bar Association Committee, with which Lefcourt was cooperating, that the Department of Justice (DOJ) intended Carefully to evaluate and exercise sound judgment in determining which cases should be selected for summons enforcement actions" and that in each case the DOJ would ". . . consider pertinent legal, factual, and evidentiary questions in determining the appropriateness of initiating a summons enforcement action." (Ross Aff., Ex. B. p. 3)

Lefcourt's affidavit indicates that he interpreted this letter to mean that ". . . the DOJ intended to allow the courts ultimately to determine on a case-by-case basis the circumstances under which the information must be provided and when it may be withheld and that the DOJ would ". . . pursue summons enforcement actions as the vehicle for obtaining such judicial

guidelines.[2] (Lefcourt Aff. ¶28.) Lefcourt avers that subsequently on December 7, 1993, the IRS Announced that it would begin unilaterally imposing fines on attorneys who assert the attorney-client privilege with respect to certain information they file on information returns. (Lefcourt Aff. ¶37.)

In this action, plaintiff is seeking a refund of $25,000 paid to the IRS as a penalty for its failure to file a complete 8300 Form in compliance with 26 U.S.C. §6050I. The 8300 Form at issue in this case was submitted by plaintiff on July 9, 1993; covered two related transactions occurring on July 2, 1993 and July 7, 1993; and reported that the Firm had received cash in excess of $10,000 in payment of legal fees, the date of the transaction, and the reason for the payment.[3] (P1.'s 3(g)

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2. According to Lefcourt, his belief that DOJ's policy was to seek summons enforcement, not summary penalties, was supported in November 1991 when then Acting Attorney General William P. Barr ("Barr") in his testimony before Congress "... assured Congress that the DOJ recognized that [*U.S. v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2nd Cir. 1991)] established that there were circumstances where an attorney could not ethically provide client-identifying information ..." and stated:

> ... Consistent with the *Goldberger & Dubin* case, the Department has informed bar association groups that it will consider 'special circumstances' presented to the IRS by lawyers in determining whether to seek judicial enforcement of a summons, but as yet, the Department has seen no case in which a lawyer has attempted to make such a factual showing either to the IRS or in court.

(Lefcourt Aff. ¶33)

3. This is not the only incomplete 8300 Form filed by plaintiff. Between 1986 and mid 1992, plaintiff filed fourteen incomplete

(Cont'd)

Stmt. ¶2; Declaration of Etta Owens ("Owens Decl".), Ex. K.) The 8300 Form submitted by plaintiff on July 9, 1993 omitted the following information: the exact amount of cash received, the name of the person from whom the fee was received, the name of the person for whom the services were provided, and the social security number or other identifying information of the client and/or the payer of the fee. (Defendant's Statement Pursuant to Local Rule 3(g) ("Def.'s 3(g) Stmt.") ¶2.)

The transactions described in the 8300 Form submitted on July 9, 1993 were the result of the Firm's being retained to represent a client facing federal charges of participating in a drug and money laundering conspiracy. The Firm received $25,000 in cash for the legal services provided to this client. (P1.'s 3(g) Stmt. ¶2.)

Along with the 8300 Form submitted on July 9, 1993, Lefcourt submitted an affidavit in which he stated in part:

> The Form 8300 is being filed in connection with the receipt of monies from an active client of this law firm. If we were to disclose on the form our client's identity or other information concerning him/her, it could severely prejudice his/her interests and undermine our ability to provide effective representation. The confidentiality of such information is protected by the attorney/client privilege, the Fifth and Sixth Amendments to the

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(Cont'd)

8300 Forms. (Declaration of Etta Owens ("Owens Decl.") ¶3, Ex. A.) those forms omitted information concerning the amount of cash received, the payor of the cash, and the identity of the person on whose behalf the cash was provided. (*Id.*)

Appendix B

United States Constitution; comparable state provisions, and the Lawyers' Code of Professional Responsibility.

(Owens Decl., Ex. L.)

In a notice dated September 24, 1993, the IRS informed plaintiff that it had filed an incomplete 8300 Form, urged plaintiff to provide the requested information in order to avoid the imposition of penalties under 26 U.S.C. §6721, and warned that an additional penalty may be assessed against those who intentionally disregard the cash reporting requirements of §6050I. (*Id.*, Ex. M.) Citing *U.S. v. Goldberger*, 935 F.2d 501 (2d Cir. 1991) and *U.S. v. Leventhal*, 961 F.2d 936 (11th Cir. 1992), the IRS stated that the "application of the cash reporting requirement to the attorney's fees is constitutional, . . . the identification in a Form 8300 of clients who make substantial cash fee payments is not a disclosure of privileged or confidential information," and attorneys are required to provide the information without a court order. (*Id.*)

In a letter dated October 19, 1993 Lefcourt, on behalf of the Firm, wrote to the IRS, stating in part:

> I have reviewed the cases you cite — *United States v. Goldberger* and *United States v. Leventhal* — and am also familiar with Department of Justice policies with respect to enforcement. I do not believe that either the cases cited or DOJ practice requires me absolutely to provide the omitted information. . . .
>
> After reviewing the facts of the matter, I believe that circumstances are such that I continue to be legally

> and ethically bound not to provide the information. The funds which are the subject of the Form were received in connection with a matter that is currently before a trial court. The provision of this information in order to complete a form, which information may be then be used against the client and the provision of which may lead to the disqualification of counsel of choice, has significant Fifth and Sixth Amendment implications and has never, to my knowledge, been required by any court. As such, I am ethically bound not to provide it and I will not do so.

(Owens Decl., Ex. N.)

On December 14, 1993, the Firm was served with a Notice of Proposed Penalties in the amount of $75,000 under 26 U.S.C. §6721(e) for the intentional disregard of the filing requirements of 26 U.S.C. §6050I. (Lefcourt Aff. ¶11; Owens Decl., Ex. O.) The proposed penalty was assessed for $75,000 based on the Firm's failure to provide the required information for three 8300 Forms, including the form submitted on July 9, 1993. (Owens Decl. ¶17.) In this notice, the IRS described the procedure for requesting a conference and submitting a written protest and noted that "[g]enerally, the Internal Revenue Service considers reliance on the attorney-client privilege, state Bar ethical rules which restrict the disclosure of client confidences, and other constitutional defenses, insufficient to establish that a failure to comply with I.R.C. 60501 is due to reasonable cause and not to willful neglect. (Owens Decl., Ex. O.) The notice also clearly stated that if the Firm provided the information before the final assessment, the penalty would be waived. (*Id.*)

In letters to the IRS dated January 7, 1994 and January 18, 1994, Lefcourt claimed that the Firms' actions did not evidence

intentional disregard; asserted that the Firm could not voluntarily provide the information under the circumstances in the absence of clear authority mandating that it do so; stated that the Firm had concluded that if it disclosed the information it would make itself a witness and lead to disqualification; and suggested that the IRS should bring a summons enforcement action so that the issues could be resolved in court. (Lefcourt Aff. ¶12; Complaint dated December 6, 1994 ("Complaints"), Exs. B. C.)

On April 8, 1994, Lefcourt attended a pre-penalty assessment conference, along with his attorneys, Lawrence Goldman and Martin Weinberg. (Lefcourt Aff. ¶13.) Robert Fernandez, a non-attorney appeals officer, represented the IRS at that meeting. (Id.) At that meeting plaintiff made a presentation setting forth his basis for withholding the information, including the belief that the Firm had acted in the manner advised by the Department of Justice (DOJ). (*Id.*) Lefcourt avers that at this meeting Mr. Fernandez stated that he believed that Lefcourt had acted in good faith without evil motive or intent to disobey the law. (*Id.*) On April 29, 1994, plaintiff sent a letter to Mr. Fernandez confirming statements made at the April 8, 1993 meeting particularly the concession that Lefcourt was acting in good faith. (Complaint, Ex. D.)

Prior to the final assessment of the penalty, plaintiff provided the information which had been omitted from two of the 8300 Forms which had been the subject of the $75,000 penalty assessed by the IRS in September of 1993. (Owens Decl. ¶18.) On July 8, 1994, plaintiff provided an amended version of the 8300 Form it had submitted on July 9, 1993, however the amended version did not provide the identity of the individual from whom the cash was received, his/her social

security number, or other client-identifying information omitted from the 8300 Form submitted on July 9, 1993. (Owens Decl. ¶¶18-19, Ex. P.)

On August 8, 1994, the Commissioner of Internal Revenue assessed a penalty of $25,000 under 26 U.S.C. §6721 against the Firm for its failure to file a complete and correct Form 8300 due to intentional disregard of a known legal duty. (P1.'s 3(g) ¶6; Complaint, Ex. F.)

On or about September 8, 1994, the Firm paid the full amount of the assessed penalty, which is a jurisdictional prerequisite to bringing an action to challenge the assessment. (P1.'s 3(g) ¶7(a); Complaint, Ex. G.) On September 8, 1994, the Firm filed IRS Form 843, by which it asserted a timely claim for refund of the payment. (P1.'s 3(g) ¶7(b); Complaint, Ex. H.). On September 9, 1994, the IRS mailed to the Firm a formal notice of disallowance of its claim for a refund. (P1.'s 3(g) ¶7(b); Complaint, Ex. I.)

On December 6, 1994, plaintiff initiated this tax refund suit.

DISCUSSION

I. *Summary Judgement Standards*

Pursuant to Rule 56 of the Fed. R. Civ. P., a party is entitled to summary judgement if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment is not

appropriate where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must view the facts in the light most favorable to the non-moving party. See *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The party seeking summary judgment bears the burden of demonstrating the absence of any genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

II. *Applicable Law*

Section 6050I of the Internal Revenue Code (IRC), an example of financial-reporting legislation, requires that the IRS be notified of substantial currency transactions. This reporting requirement plays a significant role in criminal, tax and regulatory investigations and proceedings, and assists in efforts to unearth "the underground economy." *U. S v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 503 (2d Cir. 1991)(internal citations omitted).

Section 60501 of the IRC provides in part that:

(a) Any person —

> (1) who is engaged in a trade or business, and
>
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 more related transactions), shall make the return described in subsection (b) with respect to such transaction (or related transactions)
>
> . . .

(b) A return is described in this subsection if such return —

(1) is in such form as the Secretary may prescribe, [and]

(2) contains —

(A) the name, address, and TIN [taxpayer identification number] of the person from whom the cash was received,

(B) the amount of cash received,

(C) the date and nature of the transaction, and

(D) such other information as the Secretary may prescribe. . . .

26 U.S.C. §6050I(a) and (b).

This provision exempts transactions involving certain financial institutions, 26 U.S.C. §6050I(c)(1), but despite significant lobbying efforts, Congress did not exempt attorneys from the reach of this statute. *Goldberger*, 935 F.2d at 503. Indeed, the regulations governing the implementation of §6050I adopted by the IRS explicitly describe an attorney representing a criminal defendant and receiving his fee in cash as an example of a transaction which falls within the scope of §6050I. 26 C.F.R. S1.6050I-l(c)(7)(iii), Example (2).

The failure to file a complete 8300 Form in compliance with 26 U.S.C. §6050I subjects a filer to penalties described in

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26 U.S.C. §6721(a)(2).[4] Section 6721(e) of the IRC provides that in cases where the failure to comply with §6050I is due to intentional disregard of the filing requirement, the penalty will be the greater of

> (i) $25,000, or
>
> (ii) the amount of cash . . . received in such transaction (or related transactions) to the extent the amount of such cash does not exceed $100,000 . . .

26 U.S.C. §6721(e)(2)(C)(i) & (ii).

Regulations adopted by the IRS state that "a failure is due to intentional disregard if it is a knowing or willful — (i) failure to file timely, or (ii) failure to include correct information. . . ." 26 C.F.R. §301.6721–l(f)(2). The determination of whether a failure to comply resulted from intentional disregard will involve a consideration of the facts and circumstances of the particular case.[5]

---

4. Failures that fall within the scope §6721 are:

> (A) any failure to file an information return with the Secretary on or before the required filing date, and
>
> (B) any failure to include all of the information required to be shown on the return or the inclusion of incorrect information.

26 U.S.C. §6721(a)(2)(A) & (B)

5. The facts and circumstances to be considered include:

> (i) Whether the failure to file timely or the failure to

(Cont'd)

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A penalty imposed for the intentional disregard of a filing requirement will be waived for reasonable cause only if the taxpayer "establishes the either — (i) [t]here are significant mitigating factors[6] with respect to the failure . . .; or (ii) [t]he failure arose from events beyond the filer's control. . . ."

(Cont'd)

include correct information is part of a pattern of conduct by the person who filed the return of repeatedly failing to file timely or repeatedly failing to include correct information;

(ii) Whether correction was promptly made upon discovery of the failure;

(iii) Whether the filer corrects a failure to file or a failure to include correct information within 30 days after the date of any written request from the Internal Revenue Service to file or to correct; and

(iv) Whether the amount of the information reporting penalties is less than the cost of complying with the requirement to file timely or to include correct information on an information return.

26 C.F.R. §301.6721-1(f)(3).

6. Mitigating factors include:

(1) The fact that prior to the failure the filer was never required to file the particular type of return or furnish the particular type of statement with respect to which the failure occurred, or

(2) The fact that the filer has an established history of complying with the information reporting requirement with respect to which the failure occurred.

26 C.F.R. §301.6724-1(b).

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26 C.F.R. §301.6724–l(a)(2)(i) & (ii). The filer must also establish that he or she acted in a responsible manner both before and after the failure occurred. (*Id.*) The regulations state that

> [a]cting in a responsible manner means —
>
> > (i)That the filer exercised reasonable care, which is that standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations . . . , and
> >
> > (ii) That the filer undertook significant steps to avoid or mitigate the failure[7] . . .

26 C.F.R. §301.6724-l(d)(1)(i) & (ii).

---

7. Significant steps to avoid or mitigate the failure include:

> (A) Requesting appropriate extensions of time to file, when practicable, in order to avoid the failure,
>
> (B) Attempting to prevent an impediment or a failure, if it was foreseeable,
>
> (C) Acting to remove an impediment or the cause of a failure, once it occurred, and
>
> (D) Rectifying the failure as promptly as possible once the impediment was removed or the failure was discovered. . . .

26 C.F.R. §301.6724-1(d)(1)(ii).

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III. *Willfulness*

Plaintiff's claim that it is entitled to a refund of the $25,000 penalty is premised on the contention that the Firm's refusal to supply the required client-identifying information did not constitute intentional disregard because its refusal was motivated by reasonable cause. In order to dispute this claim and show that plaintiff's actions constituted intentional disregard of a filing requirement, the government must demonstrate that the plaintiff's failure to comply was willful. The parties disagree about what standard of willfulness should be applied to plaintiff's actions.

Plaintiff contends that Willfully connotes a voluntary, intentional violation of a known legal duty and that a lack of evil intent or bad purpose, along with a good faith reliance on a sincerely held, even if incorrect, interpretation of the law, negates a claim of willfulness. *Cheek v. United States*, 498 U.S. 192, 200 (1991). According to plaintiff, the $25,000 penalty imposed in accordance with §6721 of the IRC was unlawful because the Firm's actions were based on a good faith belief that the requested client-identifying information was protected by the attorney-client privilege. Therefore, plaintiff claims its actions were not willful and did not constitute intentional disregard of a known legal duty.

Plaintiff's claims, however, are based on an importation of standards applicable in the criminal realm to the context of the imposition of civil penalties. An individual's bad purpose or evil motive play no part in the civil definition of willfulness. *Hochstein v. U.S.*, 900 F.2d 543, 548 (2d Cir. 1990) (internal citations omitted) (individual's motive in failing to collect and pay withholding taxes pursuant to 26 U.S.C. §6672 plays no

part in civil definition of willfulness). In civil actions, "willful conduct denotes intentional, knowing and voluntary acts." *Domanus v. U.S.*, 961 F.2d 1323, 1326 (7th Cir. 1992) quoting *Monday v. U.S.*, 421 F.2d 1210 (7th Cir.), *cert. denied* 400 U.S. 821 (1970) (responsible person acts willfully in failing to pay over trust fund taxes if person acts voluntarily, consciously and intentionally as opposed to accidentally). See also *Hansen v. Commissioner of Internal Revenue Service*, 820 F.2d 1464, 1469 (9th Cir. 1987) (intentional disregard occurs when a taxpayer who knows or should know of a rule or regulation chooses to ignore its requirements).

There is no question that plaintiff was aware of the requirements of §6050I. Lefcourt had participated in numerous lobbying efforts to limit the scope of §6050I and had worked on drafting proposed regulations for implementing and enforcing §6050I. There is also no doubt that the failure at issue in this case is not the result of accident or oversight. Since 1986 Lefcourt and his law firm Lefcourt & Dratel, P.C. have routinely failed to include the identity of clients and the payers of cash retainers on 8300 Forms submitted to the IRS. In addition, subsequent to the 8300 Form at issue in this case, client-identity and fee information have been omitted from 8300 forms filed by plaintiff for transactions that occurred on September 14, 1993, September 21, 1993, and October 25, 1993. (Owens Decl. ¶20.) Plaintiff knew what §6050I required and voluntarily, consciously, and intentionally failed to comply. Plaintiff's failure to include the required information in the 8300 Form submitted July 9, 1993 constitutes a willful act since it was undertaken in intentional disregard of the plain meaning of §6050I.

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IV. *Reasonable Cause*

Plaintiff contends that its failure to comply with §6050I was due to reasonable cause, and therefore, a waiver of the $25,000 penalty is warranted under 26 U.S.C. §6724. Plaintiff bases its claim of reasonable cause on (1) special circumstances under which the client-identifying information was privileged; (2) its reliance on the policies and procedures of the Department of Justice; and (3) ethical rules governing professional conduct which plaintiff claims prohibited its compliance.

A. *Special Circumstances*

Plaintiff contends that while engaged in the active representation of its client, providing the identity of its client, or the individual paying legal fees on behalf of its client, presents a risk of incriminating the client and/or making the attorney a witness in the case which would lead to his disqualification. According to plaintiff, these risks constitute special circumstances under which the required information is protected from disclosure by the attorney-client privilege and compliance with 26 U.S.C. §60SOI should be excused. This claim is contrary to the controlling law in this circuit.

The facts considered by the Second Circuit in *U.S. v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir. 1991), are very similar to those under consideration here.[8] In that case the firm of Goldberger & Dubin, P.C. received cash fees in excess of $10,000 from or on behalf of three clients. *Goldberger*, 935 F.2d at 502. The firm filed an 8300 Form disclosing the receipt

8. Lefcourt was one of the attorneys who filed an amicus curiae brief in *U.S. v. Goldberger & Dubin.*

of the cash payments, but it did not provide information regarding the identity of the clients and/or the payor of the fees. *Id.* at 503. After an unproductive exchange of correspondence between the firm and the IRS, a summons was issued, and a summons enforcement proceeding was initiated in the District Court. *Id.* The Second Circuit upheld the district court's determination that Goldberger & Dubin, P.C. was required to provide the client-identifying information.

The court in *Goldberger* found Goldberger & Dubin's contention that §6050I conflicted with the traditional doctrine of attorney-client privilege to be without merit. Noting that the limited goal of the attorney-client privilege is to encourage full disclosure of those facts which might otherwise not be revealed so that an attorney can provide clients fully informed legal advice, the court found, under the circumstances, the provision of the client identifying information required by the 8300 Form did not constitute the disclosure of privileged information. *Goldberger*, 935 F.2d at 504-505; see also *Fisher v. U.S.*, 425 U.S. 391, 403 (1976).

The Second Circuit noted that even in situations in which all elements of the attorney-client privilege have been met, the privilege may be trumped by strong public policy concerns. *Goldberger*, 935 F.2d at 505. The court then described a situation in which "the attorney-client privilege doctrine collides head on with a federal statute that implicitly precludes its application" as one where the privilege should yield to public policy concerns. *Goldberger*, 935 F.2d at 505. The court in Goldberger expressly recognized the importance of client identification as a means of uncovering tax evasion. *Id.*

Despite plaintiff's attempts, it has not been shown that the case presently under consideration can be factually distinguished

from *Goldberger*.[9] That case dealt with the active representation of clients for whom the disclosure of their identify or the identity of those paying their fees posed the threat of incrimination.

---

9. Plaintiff asserts that *Goldberger* can be distinguished because it did not involve active criminal representation, but this assertion is contradicted by the record before the Second Circuit. In the brief submitted by respondents-appellants and intervenors-appellants to the Second Circuit in support of their appeal from the April 9, 1990 final orders of the United States District Court for the Southern District of New York (Broderick, J.) *U.S. v. Fischetti Pomerantz & Russo*, M-18-304 (S.D.N.Y.); *U.S. v. Goldberger & Dubin, P.C.*, M-18-304 (S.D.N.Y.) they state in part:

> John Doe No. 1 and No. 2 were clients of Goldberger & Dubin for purposes of trial and appeal. While the case for which Goldberger & Dubin initially had been retained was completed, the firm continued to represent John Doe No. 1 and No. 2 in connection with a pending parallel indictment in another jurisdiction. The money received by Goldberger & Dubin was for legal fees for representation in those cases.
>
> (Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Mem. Oppn."), Ex. A at pp. 5–6.)
>
> Also, at the oral argument held in *Goldberger v. Dubin* on March 13, 1990, counsel representing the firm of Goldberger and Dubin stated "John Doe 1 and 2 were clients of the Goldberger & Dubin Firm, retained post-indictment, and that, in fact, while the case that they were retained on initially is over, there is a parallel pending federal indictment still pending in another federal jurisdiction, so there is active representation of John Does 1 and 2." Complaint, Ex. B-4 at pp. 27–28.

The clients of Lefcourt & Dratel, P.C. face this same risk of incrimination and nothing more.

Courts in this circuit have consistently held that despite the potential of incrimination, client-identity and fee information, absent special circumstances, are not the sort of information which falls within the privilege. *See, e.g., In re Grand Jury Subpoena Served upon Doe*, 781 F.2d 238, 247 (2d Cir. 1986); *In re Shargel*, 742 F.2d 61, 63 (2d Cir. 1984); *Colton v. U.S.*, 306 F.2d 633, 637–38 (2d Cir.), *cert. denied*, 371 U.S. 951 (1963); *U.S. v. Pape*, 144 F.2d 778, 782 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944). For example, in *In Re Shargel*, the court held that "[p]rofessionally competent and informed advice can be rendered by an attorney even though he or she must disclose that a fee was a gem suspected to have been recently stolen, currency with certain serial numbers, or a sum far in excess of the client's reported income." *In Re Shargel*, 742 F.2d 61, 63 (2d Cir. 1984).

The court's holding in *Goldberger* was not absolute, it acknowledged the possibility of special circumstances under which the disclosure of client-identifying information may be privileged. This narrow exception, however, does not apply to the plaintiff here. Special circumstances under which client-identity and fee information would be privileged exist when there is a direct link between the disclosure and the revelation of a confidential communication, or when the disclosure of client-identifying information would directly incriminate the client by providing the last link in an existing chain of evidence against the client. *U.S. v. Goldberger & Dubin, P.C.*, 935 F.2d 501, 505 (2d Cir. 1991); *U.S. v. Sindel*, 53 F.3d 874 (8th Cir. 1995); *U.S. v. Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *Cf. U.S. v. Dichne*, 612 F.2d 632, 640–641 (2d Cir. 1979). No

such circumstances exist here. Plaintiff has not made any showing that including the client-identifying information omitted from the 8300 Form filed in July 1993 would reveal a confidential communication or constitute the last link in a chain of incriminating evidence against its client. Thus, the information necessary to file a complete 8300 Form was not protected from disclosure under *Goldberger*, and the attorney-client privilege does not provide grounds upon which plaintiff can base its claim of reasonable cause warranting a waiver of the penalty assessed against it by the IRS.

Plaintiff's reliance on *U.S. v. Gertner*, 873 F. Supp. 729 (D. Mass. 1995), illustrates the fact that plaintiff's claim of privilege is in direct conflict with the controlling law in this circuit. In *Gertner*, the Massachusetts District Court's holding that the identity of a client was protected by attorney-client privilege in light of the pending charges against him is based in part on an explicit disagreement with *Goldberger*. *Gertner*, 873 F. Supp. at 736. The Massachusetts District Court could not reconcile with *Goldberger* its finding that the information required by the 8300 Form was privileged, and plaintiff is similarly unable to reconcile its claims of privilege with the controlling precedent in this circuit.

B. *Reliance on the Department of Justice*

Plaintiff contends that the $25,000 penalty assessed against it by IRS should have been waived under 26 U.S.C. §6724 because its failure to comply with 26 U.S.C. §6050I was the result of an attempt to follow procedures laid out the by the DOJ and reasonable reliance on statements of DOJ officials concerning the enforcement of 26 U.S.C. §6050I.

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Plaintiff claims that it relied on discussions with the DOJ that Lefcourt had, or was aware of, as a part of his association with efforts of the organized bar to challenge the applicability of §6050I to criminal defense lawyers and to provide lawyers with guidance about how to deal with conflicting legal, professional and ethical obligations. In addition to these discussions, plaintiff contends that it relied on a letter dated September 7, 1990 from James Burton of the Tax Division at DOJ and the November 1991 testimony of then acting attorney general, William Barr.

Nothing in the Burton letter or the referenced testimony indicated that penalties would not be assessed against filers who failed to comply with §6050I or that a summons enforcement proceeding would be deemed necessary in all cases in which special circumstances were claimed. The letter from Burton, which predated *Goldberger*, stated that pertinent legal, factual, and evidentiary issues would be considered in determining the appropriateness of initiating a summons enforcement proceeding, but this letter does not constitute a deferral to the courts to provide guidelines as to when and under what circumstances penalties can be imposed.

Plaintiff asserts that the procedure advocated by the DOJ was one in which those lawyers with a good faith belief that the client-identifying and fee information required by the 8300 Form was protected by the attorney-client privilege would withhold the information in question, substantiate their claim of privilege with an affidavit or through other means, and then argue their claim in a summons enforcement proceeding. This contention cannot be deemed reasonable in light of the fact that such a procedure would drastically inhibit the IRS's ability to enforce compliance with the reporting requirements set out by Congress

as appropriate. It is not reasonable to assume that the DOJ advocated a position in which every claim of "especial circumstances" would necessarily entitle a filer to costly and time consuming litigation.

Additionally, the Second Circuit explicitly noted that attorneys would be subject to criminal and civil penalties intended to induce compliance with §6050I in *Goldberger*. *Goldberger*, 935 F.2d at 506. The plaintiff received clear notice of the potential penalties prior to the initial assessment (Owens Decl., Ex. M) and again before the final assessment (*Id.*, Ex. O). Plaintiff knew that the IRS intended to assess a penalty for its failure to comply, and it did not have reasonable cause to expect that it was entitled to a summons enforcement action. Plaintiff's asserted reliance was not reasonable under the circumstances. Thus, plaintiff's failure was not due to reasonable cause, and there are no grounds for a waiver of the penalty under 26 U.S.C. §6724.

C. *State Ethical Rules*

Plaintiff also contends that its failure to provide the information necessary to file a complete 8300 Form was reasonable because such disclosure would have constituted a violation of state ethical rules regulating attorneys' conduct. The plaintiff's perceptions of a conflict between rules of professional conduct and the IRC, however, does not present reasonable grounds for failing to comply with §6050I. State ethical guidelines do not override the clear mandate of a federal statute.

In *Caplin & Drysdale, Chartered v. U.S.*, the Supreme Court rejected a similar argument which was grounded in

assertions of professional ethics. *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617 (1989). In *Caplin & Drysdale*, the Court held that the fact that a federal statutory scheme is at odds with model disciplinary rule or state disciplinary codes does not render the federal statute invalid. *Caplin & Drysdale*, 491 U.S. at 632, n. 10. Therefore, even if the state ethical rules may not be in accord with 26 U.S.C. §6050I, plaintiff's contention that his failure was justified is not reasonable and does not warrant a waiver under 26 U.S.C. §6724.

CONCLUSION

Plaintiff is attempting to obtain from the courts that which it was not able to obtain from Congress — an exemption for lawyers who claim that the client-identifying information required by 26 U.S.C. §6050I is protected by the attorney-client privilege. The fact remains that attorneys not wishing to file 8300 Forms may insist on payment by check. The defendant has shown that plaintiff's refusal to comply with 26 U.S.C. §6050I was a willful act, one of a series of refusals, and as such it was undertaken in intentional disregard of a legal duty. This duty was clearly articulated in *Goldberger* which controls this Court's analysis. The penalty assessed pursuant to 26 U.S.C. §6721 was lawfully imposed, and plaintiff has not shown that its failure to comply was due to reasonable cause or that any mitigating factors exist. Thus, plaintiff is not entitled to a waiver under 26 U.S.C. §6724. Accordingly, plaintiff's motion for summary judgement is denied. Defendants are entitled to judgment as a matter of law.

IT IS SO ORDERED.

Appendix B

Dated: New York, New York
May 13, 1996

s/ Robert P. Patterson, Jr.
Robert P. Patterson, Jr.
U.S.D.J.

APPENDIX C — PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC FILED DECEMBER 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 17th Day of the December one thousand nine hundred and ninety-seven.

Dkt No: 96-6151

Gerald B. Lefcourt, P.C.,

Plaintiff-Appellant,

v

United States of America,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellant Gerald B. Lefcourt.

Upon consideration by the panel that decided the appeal, it is Ordered that said for rehearing is **DENIED.**

Appendix C

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: s/ Arthur M. Heller
Arthur M. Heller
Administrative Attorney

APPENDIX D — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. V:

> No person . . . shall be compelled in any criminal case to a witness against himself.

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

26 U.S.C. § 6050I (Supp. 1998):

§6050I. Returns relating to cash received in trade or business, etc.

(a) Cash receipts of more than $10,000. — Any person—

> (1) who is engaged in a trade or business, and
>
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),

shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

(b) Form and Manner of Returns. — A return is described this subsection if such return —

(1) is in the such form as the Secretary may prescribe,

(2) contains —

(A) the name, address, and TIN of the person from whom the cash was received,

(B) the amount of cash received,

(C) the date and nature of the transaction, and

(D) such other information as the Secretary may prescribe.

26 U.S.C. § 6721(e) (Supp. 1997)

§ 6721. Failure to file correct information returns

(a) Imposition of penalty. —

(1) In general. — In the case of a failure described in paragraph (2) by any person with respect to an information return, such person shall pay a penalty of $50 for each return with respect to which such a failure occurs, but the total amount imposed on such person for all failures during any calendar year shall not exceed $250,000.

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(2) Failures subject to penalty. — For purposes of paragraph (1), the failures described in this paragraph are —

(B) any failure to include all of the information required to be shown on the return or inclusion of correct information.

(e) Penalty in case of intentional disregard. — If 1 or more failures described in subsection (a)(2) are due to an intentional disregard of the filing requirement (or the correct information reporting requirement), then, with respect to each such failure —

(1) subsections (b), (c), and (d) shall not apply,

(2) the penalty imposed under subsection (a) shall be $100, or, if greater —

(C) in the case of a return required to be filed under section 60501(a) with respect to any transaction (or related transactions), the greater of —

(i) $25,000, or

(ii) the amount of cash . . . received in such transaction (or related transactions) to the extent the amount of such cash does not exceed $100,000 . . .

Appendix D

26 U.S.C. § 6724 (Supp. 1998)

§ 6724 Waivers definitions and special rules

(a) Reasonable cause waiver. — No penalty shall be imposed under this part with respect to any failure if it is shown that such a failure is due to reasonable cause and not to willful neglect.

(d) Definitions. — For purposes of this part —

(1) Information return. — The term "information return" means —

(B) Any return required by —

(iv) section 60501(a) or (g)(1) (relating to cash received in trade or business, etc.)

APPENDIX E — LEGISLATIVE HISTORY OF 26 U.S.C. § 6721(e)

Subtitle G. Revision of Civil Penalties ("Improved Penalty Administration and Compliance Tax Act")

1. Information reporting penalties (secs. 11701–11715 of the bill and new secs. 6721–6724 of the Code and secs. 6011 and 6038 of the Code)

Present Law

In general

Any person that fails to file an information return with the Internal Revenue Service on or before the prescribed filing date is subject to a $50 penalty for each failure, with a maximum penalty of $100,000 per calendar year. Information returns relating to interest and dividends are subject to this $50 penalty for each failure, but without any cap on the total amount of penalty that may be imposed. In addition, any person that fails to provide a copy of an information return (a "payee statement") to a taxpayer on or before the prescribed due date is subject to a penalty of $50 for each failure, with a maximum penalty of $100,000 per calendar year. If a person fails to include all of the information required to be shown on an information return or a payee statement or includes incorrect information, then a penalty of $5 may be imposed with respect to each such failure, with a maximum penalty of $20,000 per calendar year. Stricter penalty provisions apply in the case of interest and dividend returns and in the case of intentional failures to comply with the information return requirements.

A penalty may also be imposed for each failure to include a correct taxpayer identification number on a return or statement and for each failure to furnish a correct taxpayer identification

number to another person. The amount of the penalty that may be imposed is either $5 or $50 for each failure, depending on the nature of the failure.

Foreign provisions

Income of foreign persons subject to withholding

Persons having control, receipt, custody, disposal, or payment of certain types of U.S. income of foreign persons are required to deduct and withhold U.S. tax from such income under chapter 3 of the Code's income tax provisions (secs. 1441–1464). Generally, any person required to serve as a withholding agent under chapter 3 must provide each income recipient an annual withholding statement (Form 1042S) and must file all required Forms 1042S with the IRS accompanied by a return (Form 1042) summarizing the information of the Forms 1042S (Reg. sec. 1.1461-2). As described above, the Code generally provides penalties for each failure to file a required information return with the IRS and each failure to provide a required payee statement. These penalties do not apply, however, to each failure with respect to Forms 1042S.

Information reporting

Generally, every U.S. person is required to report certain information concerning any foreign corporation that such person controls and information relating to transactions between the corporation and certain specified persons. Failure to provide such information subjects the U.S. person to a monetary penalty plus a denial of foreign tax credits (sec. 6038). These information reporting requirements and this penalty do not specifically refer to all types of information needed to determine tax liabilities with respect to controlled foreign corporations.

Appendix E

Reasons for Change

The committee believes that the present-law penalties should be modified to encourage persons to file correct information returns even though such returns are filed after the prescribed filing date. The committee believes that it is important to give taxpayers an incentive to correct their errors as rapidly as possible.

Explanation of provisions

Overview

The bill modifies the information return penalties provided under present law in order to encourage persons to file correct information returns even though such returns are filed after the prescribed filing date. The committee has established a three-tier penalty structure in which the amount of the penalty varies with the length of time within which the taxpayer corrects the failure. The committee believes that this structure will give taxpayers an incentive to correct their errors as rapidly as possible. The committee also provides that taxpayers may correct a *de minimis* number of errors and avoid penalties entirely. The bill makes uniform the reporting requirements applicable to magnetic media and requires a study of service bureaus, which file information documents on behalf of other persons.

Failure to file correct information returns

Under the bill, any person that fails to file a correct information return with the Internal Revenue Service on or before the prescribed filing date is subject to a penalty that varies based on when, if at all, the correct information return is filed.

Appendix E

If a person files a correct information return after the prescribed filing date but on or before the date that is 30 days after the prescribed filing date, the amount of the penalty is $15 per return, with a maximum penalty of $75,000 per calendar year. If a person files a correct information return after the date that is after 30 days after the prescribed filing date but on or before August 1, the amount of the penalty is $30 per return, with a maximum penalty of $150,000 per calendar year. If a correct information return is not filed on or before August 1 of any year, the amount of the penalty is $50 per return, with a maximum penalty of $250,000 per calendar hear.

The committee chose this initial 30-day period for filing correct information returns with a smaller penalty because it believes that it is vital to the integrity of the self-assessment system that taxpayers receive their payee statements on a timely basis (generally, these must be provided by January 31). The preparation of these payee statements given to taxpayers is integrally connected with the preparation of the parallel information returns given to the IRS. The committee believes that this initial 30-day period gives filers of these information returns an appropriate amount of time within which to correct failures with respect to documents prepared for the IRS without jeopardizing the provision of the payee statements directly to taxpayers on a timely basis. Similarly, the committee chose the August 1 date because this is approximately the date on which the IRS begins intensive processing and use of this data. Consequently, submission of the data after this date is effectively equivalent to not providing the data at all. The committee expects that in future years advancements in available technology may permit the IRS to utilize this data earlier in the year. If this proves to be the case, the committee expects the IRS to request that the Congress consider modifying this deadline legislatively.

Appendix E

The bill also provides a special rule for *de minimis* failures to include the required, correct information. This exception applies to incorrect information returns that are corrected on or before August 1. Under the exception, if an information return is originally filed without all of the required information or with incorrect information and the return is corrected on or before August 1, then the original return is treated as having been filed with all of the correct required information. The number of information returns that may qualify for this exception for any calendar year is limited to the greater of (1) 10 returns or (2) one-half of one percent of the total number of information returns that are required to be filed by the person during the calendar year.

The use of 10 returns for this purpose effectively provides a special small-business rule in this penalty. According to IRS statistics, approximately 84 percent of payors who file information returns with the IRS file 10 or fewer forms. Thus, these payors will have until August 1 to correct without penalty errors of omission or commission on information returns that were originally timely-filed with the IRS. If the total number of returns corrected by the taxpayer exceeds the *de minimis* threshold, only the number exceeding the threshold is subject to penalty. This specific *de minimis* rule in no way restricts the ability of the IRS or the courts to grant a waiver based on reasonable cause (discussed below).

In addition, the bill provides special, lower maximum levels for this penalty for small businesses. Small businesses are defined as firms having average annual gross receipts for the most recent 3 taxable years that do not exceed $5 million. The maximum penalties for small businesses are: $25,000 (instead of $75,000) if the failures are corrected on or before 30 days after the

prescribed filing date; $50,000 (instead of $150,000) if the failures are corrected on or before August 1; and $100,000 (instead of $250,000) if the failures are not corrected on or before August 1.

The committee intends that taxpayers who correct errors in payor statements filed with IRS also make any necessary parallel corrections to payee statements provided to taxpayers. In addition, the committee intends that the substance of the current IRS temporary regulations (Treas. Reg. sec. 301.6723–1T(b)), providing an exception from penalty for inconsequential omissions and inaccuracies, be continued and expanded to apply to information returns, payee statements, and failures to comply with other information reporting requirements (new secs. 6721, 6722 and 6723).

In addition, the committee notes that the IRS permits taxpayers to request extension of time to file information returns (such as by Form 8809). The committee approves of the existence of administrative procedures to consider requests for extension and expects that these types of procedures will continue to be available to payors.

The bill maintains the present-law rules for failures that are due to intentional disregard of the filing requirement. Failure to correct information returns within a reasonable time after being requested to do so by the IRS could be considered to be intentional disregard. In addition, some have expressed to the committee the belief that the overall caps on these penalties are inappropriate, in that payors who are required to file large numbers of information returns or payee statements may ignore the requirements to do so and pay the maximum penalty as a "cost of doing business" where it is less than the cost of

compliance would be. The committee believes that the general caps serve an important function and should be retained. The committee believes that behavior such as ignoring filing requirements in the manner just described is intentional disregard of those requirements, and that payors who engage in such behavior should be subject to the higher penalties (without caps) that apply in cases of intentional disregard.

* * *

APPENDIX F — FORM 8300

Form 8300 **OMB No. 1545-0892**
(Rev. January 1989) **Expires 12-31-89**
Department of the Treasury
Internal Revenue Service

Report of Cash Payments Over $20,000 Received in a Trade or Business

Part I Identity of Individual From Whom the Cash Was Received

Last Name: ~~Provision of this information would violate attorney/client privilege, the 5th & 6th Amendments to the United States Constitution; comparable state provisions, and the Lawyers Code of Professional Responsibility~~

* * *

Part II Individual or Organization for Whom This Transaction Was Conducted

Individual's last name:
SEE ABOVE

* * *

Part III Decription of Transaction and Method of Payment

Amount of cash received ~~in excess of~~ 10,000
Amount in item 35 in $100 bills or higher

Nature of transaction:
☒ business services provided

Appendix F

Specific description of property or service (Serial or registration no., address, etc.):
Legal advice

* * *

Date paid: 07 02 93

Part IV Business Reporting This Transaction

Name of reporting business:
Lefcourt & Dratel, P.C.

Identification number:
EIN 133085114

Street address:
148 East 78th Street

City	State	Zip code	Nature of your business
New York	NY	10021	attorney

Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

s/ Gerald Lefcourt President July 9, 1993

Supreme Court, U.S.
FILED
MAY 20 1998
OFFICE OF THE CLERK

(2)

No. 97-1543

In the Supreme Court of the United States

OCTOBER TERM, 1997

GERALD B. LEFCOURT, P.C., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
LORETTA C. ARGRETT
Assistant Attorney General
CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

16 pp

QUESTION PRESENTED

Whether the civil penalty for intentional disregard of the reporting requirements of Section 6050I of the Internal Revenue Code, 26 U.S.C. 6050I, was properly imposed in this case.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 125 F.3d 79. The opinion of the district court (Pet. App. 22a-46a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on September 10, 1997. The petition for rehearing and suggestion for rehearing en banc was denied on December 17, 1997. The petition for a writ of certiorari was filed on March 17, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Gerald B. Lefcourt, P.C., is a professional corporation that specializes in criminal defense work. During the summer of 1993, petitioner undertook the representation of a client who faced federal drug and money laundering charges. The client paid petitioner more than $10,000 in cash for legal services (Pet. App. 4a).

Under Section 6050I of the Internal Revenue Code, a person who receives more than $10,000 in cash in a business transaction is required to file a return (known as Form 8300) that identifies the payor, the amount of the cash payment and the nature of the transaction. 26 U.S.C. 6050I(b). On July 9, 1993, petitioner submitted a Form 8300 that notified the Internal Revenue Service of a cash payment for legal fees in excess of $10,000. Petitioner refused, however, to disclose the exact amount of the cash received, the name of the person from whom the cash was received and the name of the person for whom the services were provided.[1] Instead, petitioner attached to the Form 8300 an affidavit that asserted that the client identity and fee information called for by Section 6050I was protected from disclosure by the attorney client privilege, the Fifth and Sixth Amendments of the Constitution and the Lawyer's Code of Professional Responsibility (Pet. App. 4a, 25a-27a).

On December 14, 1993, the Internal Revenue Service served petitioner with a notice of proposed civil

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[1] Between 1986 and 1992, petitioner filed several other Forms 8300 that similarly omitted information concerning the amount of cash received, the payor of the cash and the identity of the person on whose behalf the cash was provided (Pet. App. 25a-26a n.3).

penalties. Under Section 6721(e) of the Code, a civil penalty may be imposed against any taxpayer who intentionally disregards the reporting requirements of Section 6050I. 26 U.S.C. 6721(e). On August 8, 1994, the IRS assessed a penalty of $25,000 against petitioner under Section 6721(e). Petitioner paid the full amount of the penalty and brought this refund action in district court (Pet. App. 4a-5a, 28a-30a).

2. The district court granted summary judgment to the government. The court held that petitioner was liable for the $25,000 penalty under Section 6721(e) because it had intentionally disregarded the reporting requirements of Section 6050I. The court further concluded that, because petitioner had failed to establish that it acted with "reasonable cause," it was not entitled to a waiver of the penalty under Section 6724. The court rejected petitioner's contention that the identity of petitioner's client was protected from disclosure under the attorney client privilege and that compliance with the reporting requirements of Section 6050I should therefore be excused (Pet. App. 5a, 36a-45a).[2]

3. The court of appeals affirmed. The court agreed with the district court that the failure of petitioner to disclose the identity of the payor constituted willful and intentional disregard of the reporting obligations of Section 6050I. The court concluded that petitioner had not established "reasonable cause" to excuse intentional noncompliance with Section 6050I because petitioner's decision to withhold the information did

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[2] After the district court decision was entered, petitioner filed an amended Form 8300 that provided the name of the client and the other information that previously had been omitted from the Form (Pet. 3; Pet. App. 5a).

not conform to the standard of care that a reasonably prudent person would use in the course of his trade or business. The court explained that a proper degree of care had not been exercised by petitioner because the case law squarely rejected the contention that the risk of client incrimination is a circumstance that justifies nondisclosure of the required information (Pet. App. 7a-21a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The disclosure requirements of Section 6050I(a) of the Internal Revenue Code apply to attorneys and to all other persons engaged in business activities. The statute requires "[a]ny person (1) who is engaged in a trade or business, and (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions)" to file a return that discloses "(A) the name, address and [taxpayer identification number] of the person from whom the cash was received, (B) the amount of cash received, (C) the date and nature of the transaction, and (D) such other information as the Secretary may prescribe." 26 U.S.C. 6050I(b)(2).

It is well established that, in the absence of exceptional circumstances, the identity of a client and the amount of the fees paid by that client are not within the scope of the attorney client privilege. See *e.g.*, *Vingelli* v. *U.S. Drug Enforcement Agency*, 992 F.2d 449, 452 (2d Cir. 1993); *Tornay* v. *United States*, 840 F.2d 1424, 1426 (9th Cir. 1988); *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d 1485, 1488 (10th Cir.

1990); *In re Grand Jury Proceedings (Newton)*, 899 F.2d 1039, 1044 (11th Cir. 1990). The reporting requirements of Section 6050I are thus not inconsistent with traditional attorney client privilege concerns. See, *e.g.*, *United States* v. *Goldberger & Dubin, P.C.*, 935 F.2d 501, 504-505 (2d Cir. 1991); *United States* v. *Blackman*, 72 F.3d 1418, 1425 (9th Cir. 1995), cert. denied, 117 S. Ct. 275 (1996); *United States* v. *Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992). See also *United States* v. *Ritchie*, 15 F.3d 592, 602 (6th Cir.) (dictum), cert. denied, 513 U.S. 868 (1994).

Petitioner contended in the courts below, however, that there was a possibility that client identity and fee information could incriminate its client in an active criminal investigation and that this possibility constituted a "special circumstance" that warranted protection of the information from disclosure. The courts have consistently held, however, that client identity and fee information is not privileged even if it is conceivably incriminating (Pet. App. 12a-18a, citing *In re Grand Jury Subpoena Duces Tecum Served Upon Gerald L. Shargel*, 742 F.2d 61 (2d Cir. 1984), and *In re Grand Jury Subpoena Served Upon John Doe, Esq.*, 781 F.2d 238 (2d Cir. 1986)). Accord *United States* v. *Goldberger & Dubin*, 935 F.2d at 502, 505 (law firm with clients under criminal indictments not exempt from reporting requirements of Section 6050I); *United States* v. *Leventhal*, 961 F.2d at 938 & nn.4, 5 (same); *United States* v. *Sepenuk*, 864 F. Supp. 1002 (D. Ore. 1994) (rejecting contention that disclosures required by Form 8300 might lead to future incrimination of client); *United States* v. *Garland*, 69 A.F.T.R.2d 1283 (N.D. Ga. 1992) (same). See also notes 3-4, *infra*.

Courts have, however, described three narrow and overlapping "special circumstances" under which client identity and fee information may be protected by the attorney-client privilege—the "legal advice" exception, the "last-link" exception and the "confidential communication" exception. The "legal advice" exception protects client identity and fee information when there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought. The "last-link" exception protects the disclosure of a client's identity by an attorney when such information would incriminate the client by providing the last-link in an existing chain of evidence. The "confidential communication" exception prevents disclosure of the client's identity and fee information where the disclosure would be tantamount to disclosing an otherwise protected confidential communication. See *United States* v. *Sindel*, 53 F.3d 874, 876 (8th Cir. 1995); *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d at 1488-1493. Petitioner erroneously contends (Pet. 9-10) (i) that the required disclosures of the identity of the client and the amount of the fees paid would reveal "legal advice" and (ii) that there is a conflict among the circuits as to whether the attorney-client privilege protects such "legal advice" from disclosure under Section 6050I.

The attorney-client privilege extends only to confidential communications between attorneys and their clients. *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981). The "legal advice" and "last-link" exceptions therefore can apply only to information obtained through confidential communications. See 3 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* § 503.14[5][a] (J. McLaughlin ed., 2d ed. 1998). While

petitioner is correct in noting that the Second Circuit has never endorsed the "legal advice" exception (see Pet. App. 17a), the courts that do apply the "legal advice" and "last-link" rationales apply them only when disclosure of the client's identity and fee information would reveal a confidential communication. See *In re Grand Jury Subpoenas (Anderson)*, 906 F.2d at 1488-1492; *Vingelli* v. *U.S. Drug Enforcement Agency*, 992 F.2d at 452-453. As the court explained in *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493, 497 (9th Cir. 1986), the relevant inquiry under the "legal advice" exception is not whether the fact that a fee was paid to the attorney would implicate the client in crime but whether information concerning the fee is itself a confidential communication.[3] The decision in this case is consistent with those decisions, for it holds that the attorney-client privilege encompasses only those confidential communications necessary to obtain legal advice (Pet. App. 20a).

Moreover, even if independent vitality remained in the "legal advice" exception, petitioner does not cite any appellate decision that conflicts with the decision in this case or that adopts petitioner's broad inter-

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[3] Attorneys have a professional obligation not to accept money from a client that constitutes the fruits of a crime or a continuing fraud. *United States* v. *Goldberger & Dubin*, 935 F.2d at 506; *In re Ryder*, 381 F.2d 713, 714 (4th Cir. 1967). If an attorney were aware that assets used to pay legal fees were derived from the very criminal acts for which representation was sought, he could not ethically accept the fees. See *In re Ryder*, 381 F.2d at 714. As the court of appeals stated in *United States* v. *Ritchie*, 15 F.3d at 601, law firms do not have a "potential monopoly on money laundering simply because their services are personal and confidential." In the present case, the district court noted that there were no facts directly linking the client's fee payments to a crime (Pet. App. 18a).

pretation of the attorney-client privilege. See Pet. 7-9 & n.3. Petitioner does seek to rely (Pet. 8-10) on the decision of the district court in *United States* v. *Gertner*, 873 F. Supp. 729 (D. Mass.), aff'd, 65 F.3d 963 (1st Cir. 1995). Contrary to petitioner's assertion (Pet. 10), however, the First Circuit did not endorse the "legal advice" exception in *Gertner*. Instead, the First Circuit expressly declined to affirm the district court on that basis. 65 F.3d at 966, 971.

The asserted conflict among the circuits thus does not exist. Moreover, the application of the attorney-client privilege has no continuing significance in this case apart from the civil tax penalty, for petitioner has now provided the required client identity and fee information to the IRS. See note 2, *supra*.[4]

2. Petitioner erroneously contends (Pet. 13-16) that the decision in this case conflicts with ethical rulings that govern the practice of law. In rejecting a similar argument, the Eighth Circuit stated in *United States* v. *Sindel*, 53 F.3d at 877, that "Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements of 26 U.S.C. § 6050I." Accord *United States* v. *Blackman*, 72 F.3d at 1424; *United States* v. *Leventhal*, 961 F.2d at 940. In any event, as the court explained in *United*

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[4] The scope of the attorney-client privilege is, in any event, not squarely at issue under Section 6050I. As the Second Circuit explained in *United States* v. *Goldberger & Dubin*, 935 F.2d at 505-506, even if the attorney-client privilege were technically applicable, the plain text of Section 6050I and the public policy underlying that statute take precedence and require the information to be revealed. See also *United States* v. *Leventhal*, 961 F.2d at 940-941 (agreeing with the "persuasive" reasoning of *Goldberger & Dubin*).

States v. *Monnat*, 853 F. Supp. 1301, 1309 (D. Kan. 1994), a lawyer does not act unethically by complying with statutory requirements enacted by Congress. The fact that a federal statutory scheme "is at odds with model disciplinary rules or state disciplinary codes hardly renders the federal statute invalid." *Caplin & Drysdale, Chartered* v. *United States*, 491 U.S. 617, 632-633 n.10 (1989).

Moreover, the asserted ethical dilemma posed by petitioner (Pet. 11, 13-14) is easily avoided. As several courts have noted, clients can be asked to pay in some manner other than cash. *United States* v. *Goldberger & Dubin*, 935 F.2d at 504; *United States* v. *Leventhal*, 961 F.2d at 941. As the court stated in *United States* v. *Blackman*, 72 F.3d at 1425, "[a]ttorneys should inform clients proffering cash in excess of $10,000 for fees that they will normally be obligated to disclose fee-payer identity and the nature of the fee arrangement in filing Form 8300."

3. Finally, petitioner errs in contending (Pet. 16-17) that the criminal standard of intent articulated in *Cheek* v. *United States*, 498 U.S. 192 (1991), should govern the imposition of the civil tax penalty for intentional disregard of the reporting requirements of Section 6050I. In *Cheek*, the Court was interpreting the term "willful" as applied to criminal tax offenses. 498 U.S. at 193-194. Willfulness is not an element of the civil tax penalty involved in this case. See 26 U.S.C. 6721(e).[5] The definition of criminal willfulness

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[5] 26 U.S.C. 6721(e) imposes a civil penalty for "intentional disregard" of the reporting requirement. While a "willful" violation could result from the "intentional disregard" of the reporting requirement (see 26 C.F.R. 301.6721-1(f)(2)(ii)), the term "intentional disregard" in this statute means "only that a

applied to criminal tax statutes in *Cheek* does not apply to civil tax penalties imposed by the Internal Revenue Code. See, *e.g.*, *Hochstein* v. *United States*, 900 F.2d 543, 548 (2d Cir. 1990); *Domanus* v. *United States*, 961 F.2d 1323, 1326 (7th Cir. 1992); *Denbo* v. *United States*, 988 F.2d 1029, 1034-1035 (10th Cir. 1993).

Contrary to petitioner's contention (Pet. 18), these decisions do not conflict with *Richey* v. *United States Internal Revenue Service*, 9 F.3d 1407 (9th Cir. 1993). In *Richey*, the Ninth Circuit held that the taxpayer was collaterally estopped in his civil tax case from proving that he had not acted willfully because willfulness had already been established in his criminal conviction for preparing fraudulent tax returns. *Id.* at 1411. Moreover, the Ninth Circuit agreed with the government in *Richey* that the standard applicable to the tax negligence penalty differs from the standard for determining criminal willfulness under *Cheek*. *Id.* at 1413-1414.[6]

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party act voluntarily in withholding requested information, rather than accidentally or unconsciously" (Pet. App. 9a).

[6] Petitioner is mistaken in asserting (Pet. 19-20) that the penalty imposed by Section 6721(e) is a "criminal punishment" under the criteria described in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997). The Court explained in *Hudson* that whether a particular punishment is civil or criminal is "a matter of statutory construction" and that the court should first look to see if the legislature has indicated that it intended to establish a civil penalty. 118 S. Ct. at 493. Congress expressed a clear intent to establish a civil, not criminal, sanction in enacting Section 6721(e). See H.R. Rep. No. 426, 99th Cong., 1st Sess. 829 (1986); S. Rep. No. 313, 99th Cong., 2d Sess. 175 (1986); H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. Pt. 2, at 777 (1986). The monetary penalty under Section 6721(e) is not

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LORETTA C. ARGRETT
Assistant Attorney General
CHARLES E. BROOKHART
JOHN A. DUDECK, JR.
Attorneys

MAY 1998

"so punitive in purpose and effect as to render * * * [it] criminal despite Congress' intent to the contrary." *Hudson* v. *United States*, 118 S. Ct. at 495.

Supreme Court, U.S.
FILED
MAY 20 1998
CLERK

No. 97-1543

In The

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October Term, 1997

GERALD B. LEFCOURT, P.C.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FILED BY GERALD B. LEFCOURT, P.C.

SAMUEL J. BUFFONE
Counsel of Record
PETER K. LEVITT
ROPES & GRAY
1301 K Street, N.W., Suite 800 East
Washington, DC 20005-3333
(202) 626-3900

LISA B. KEMLER
ZWERLING & KEMLER
P.O. Box 20002
Alexandria, VA 22320
(703) 684-8000

May 20, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Second Circuit held that attorneys who fail to report client-identifying information on cash transaction reports filed with the Internal Revenue Service are subject to a $25,000 penalty under 26 U.S.C. § 6721 for "intentional disregard" of filing requirements even if they had a good faith belief that the information was protected by the attorney-client privilege and therefore not required by the statute. The questions presented are:

1. Should the Court grant certiorari because the Second Circuit's conversion of the "intentional disregard" standard into one of "willfulness" eliminates consideration of the taxpayer's good faith belief that he is in compliance with the law?

2. Should the Court grant certiorari because the Second Circuit improperly applied a purely objective test in evaluating "reasonable cause" under the mandatory waiver provision of 26 U.S.C. § 6724, thus completely eliminating from § 6721 any consideration of a taxpayer's good faith belief that he is in compliance with the law?

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FILED BY GERALD B. LEFCOURT, P.C.

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief as *amicus curiae* in support of the Petitioner in accordance with Supreme Court Rule 37.2. All parties have consented to this filing, and their written consents are filed with this brief.[1]

INTEREST OF THE *AMICUS CURIAE*

The NACDL is the preeminent organization in the United States advancing the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. A professional bar association founded in 1958, NACDL's almost 10,000 direct members – and 80 state and local affiliate organizations with another 28,000 members – include private criminal defense lawyers, public defenders, active United States military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. Mr. Gerald B. Lefcourt is the current President of the NACDL.

The primary concern of *amicus* in this case is that the Circuit's decision places its members, and all defense attorneys, in a position at odds with their clients' interests under the threat of substantial penalty. The *Lefcourt* opinion effectively precludes any consideration of a good faith belief by the attorney that protection of his client's privilege is justified under applicable law. Moreover, by directly imposing a penalty, rather than employing an administrative summons seeking the identity of the client, the IRS forecloses any judicial testing of the privilege before the attorney subjects herself to substantial penalties.

The NACDL membership reports that the IRS is utilizing the *Lefcourt* standard on a nationwide basis to argue that any voluntary, as opposed to accidental, exclusion of client-identifying information on a Form 8300 subjects attorneys to substantial penalties, regardless of the attorney's good faith belief that the information is protected by the attorney-client privilege, and that he is therefore in compliance with the statute. The standard announced in *Lefcourt* is contrary to the plain language of the statute and caselaw from other circuits. This Court should therefore grant certiorari to ensure that a uniform standard governs this important issue.

SUMMARY OF ARGUMENT

In two ways, Congress endeavored to ensure that the $25,000 penalty for failure to include information on a Form 8300 would not be imposed on a person whose failure to include the information was due to a good faith

belief that he was not required to disclose the information. First, Congress authorized the Internal Revenue Service ("IRS") to impose the $25,000 penalty only if the incomplete or incorrect filing was "due to intentional disregard of the filing requirement." 26 U.S.C. § 6721(e). Second, Congress provided that, in any event, the IRS *must* waive the penalty if the failure was "due to reasonable cause" and not "willful neglect." 26 U.S.C. § 6724(a). The Second Circuit ignored the plain language of the statute and held irrelevant a filer's good faith belief that he was not legally required to disclose information on a Form 8300.

The phrases "intentional disregard," and "reasonable cause" and not "willful neglect," are terms of art used throughout the Internal Revenue Code (the "Code") to set the standard by which the IRS evaluates whether to impose tax penalties in a variety of circumstances. The consequences of the Second Circuit's decision are thus widespread and severe. This Court should grant certiorari because the Second Circuit's decision is contrary to the plain language of the statute and decades of case-law construing that language.

ARGUMENT

I. The Court Should Grant Certiorari Because the Second Circuit's Interpretation of the Penalty Provision Is Contrary to the Plain Language of the Statute and Caselaw Construing that Language

A. The Statutory Scheme

Section 6050I of the Code requires a person who receives more than $10,000 in cash during a single trade or business transaction to file a form (Form 8300) reporting the name, address, occupation, and social security number of the payor, along with the date and nature of the transaction and the amount involved. 26 U.S.C. § 6050I. Section 6721 of the Code establishes a two-tiered system of potential penalties when a filer fails to include all of the required information on a Form 8300. First, the statute authorizes the IRS to impose a $50 penalty for "any failure to include all of the information required to be shown on the return or the inclusion of incorrect information." *Id.* § 6721(a)(2)(B). Any failure, regardless of the filer's intent, therefore implicates the $50 penalty. Second, the statute authorizes the IRS to impose a vastly harsher penalty – equal to the greater of $25,000 or the amount of cash received in the transaction – if the filer's failure to include all of the required information was "due to intentional disregard of the filing requirement." *Id.* § 6721(e)(2)(C).

Attorney Lefcourt filed a Form 8300 complete in all aspects except that he excluded client-identifying information. Lefcourt attached a detailed statement informing the IRS of his belief that he was not required to disclose this information because it was protected by the attorney-

client privilege. Rather than judicially test Lefcourt's claim of privilege through an administrative summons, the IRS directly penalized Lefcourt $25,000 for "intentional disregard" of the filing requirement.

B. The Second Circuit's Interpretation of Intentional Disregard is Contrary to the Plain Language of the Statute

Congress chose the "intentional disregard" standard to govern imposition of a penalty under § 6721. In affirming Lefcourt's penalty, the Second Circuit replaced the two words chosen by Congress, "intentional disregard" with the single word "willful," which it defined as requiring only that a party act "voluntarily in withholding requested information, rather than accidentally or unconsciously." *Gerald B. Lefcourt P.C. v. United States*, 125 F.3d 79, 83 (2d Cir.1997) ("Thus, in our view, the 'intentional disregard' set forth in § 6721's penalty provision means conduct that is willful, a term which in this context *requires only that a party act voluntarily in withholding requested information*, rather than accidentally or unconsciously.") (emphasis added). In so doing, the Second Circuit improperly read the word "disregard" out of § 6721(e)(2)(C), rendering irrelevant Lefcourt's asserted good faith belief that he was in compliance with the statute. *See id.* ("Once it is determined, as it was here, that the failure to disclose client-identifying information was done purposefully, rather than inadvertently, *it is irrelevant that the filer may have believed he was legally justified in withholding such information.*") (emphasis added).

The terms "willful" and "intentional" are generally considered synonymous. See, e.g., *Kawaauhau v. Geiger*, 118 S. Ct. 974, 977 (1998) (equating "willful" and "intentional"); Black's Law Dictionary 1103 (abridged 6th ed.1990) (defining willful as voluntary, deliberate, or intentional). The word "disregard," however, has its own, independent meaning. Black's defines "disregard" as: "To treat as unworthy of regard or notice; to take no notice of; to leave out of consideration; to ignore; to overlook; to fail to observe." Black's Law Dictionary 327. Other definitions are similar. *See, e.g.*, The American Heritage Dictionary 669 (2d. ed.1991) ("[l]ack of thoughtful attention or due regard).

The Second Circuit held that "intentional disregard" "requires only that a party act voluntarily in withholding requested information." *Lefcourt*, 125 F.2d at 83. If Congress had intended to authorize the IRS to penalize a party for "voluntarily" withholding requested information, it would have used the word "intentional" by itself. Instead, the word "intentional" in § 6721 modifies the word "disregard," indicating that the penalty may be imposed only for a deliberate or intentional *disregard* of a filing requirement, not merely a voluntary or intentional act that results in a failure to comply with a filing requirement. *See Kawaauhau*, 118 S.Ct. at 977 ("The word 'wilful' in (a)(6) modifies the word 'injury,' indicating that nondischargeability takes a deliberate or intentional injury, not merely a deliberate or intentional act that leads to injury.").

When the words "intentional" and "disregard" are read together their meaning is plain and unambiguous. "Intentional disregard occurs when a taxpayer who

knows or should know of a rule or regulation *chooses to ignore its requirements.*" *Crowd Management Serv. v. Deloretto*, 889 F.Supp. 1313, 1317 (D.Or.1995) (quoting *Hansen v. Commissioner*, 820 F.2d 1464, 1469 (9th Cir.1987) (emphasis added)). *See also Marcello v. Commissioner*, 380 F.2d 499, 506 (5th Cir.1967), *cert. denied*, 389 U.S. 1044 (1968). The Second Circuit improperly read "disregard" out of the statute. *Cf. Commissioner v. Acker*, 361 U.S. 87, 91 (1959) ("We are here concerned with a taxing Act which imposes a penalty. The law is settled that 'penal statutes are to be construed strictly,' and that one 'is not to be subjected to a penalty unless the words of the statute plainly impose it.' ") (footnote and citations omitted).

In determining that "disregard" has no meaning in the statute, the Second Circuit relied solely on an IRS regulation equating "willfulness" with "intentional disregard." *Lefcourt*, 125 F.3d at 83 (citing 26 C.F.R. § 301.6721-1(f)(2)(ii)). Because the term "intentional disregard" is unambiguous, and has a meaning other than that ascribed to it by the IRS, the court erred in deferring to the IRS's interpretation of the term. *See Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

Lefcourt maintained that he was not required to include his client's name on the Form 8300 because it was privileged. If Lefcourt believed in good faith that he was in compliance with the law, then he did not intentionally "disregard," "ignore," or "overlook" the law's requirements. Because the Second Circuit improperly read the word "disregard" out of the statute, and decided the case as a pure question of law affirming a grant of summary

judgment, Lefcourt's asserted good faith belief in his position was never evaluated by a trier of fact.

The Second Circuit's disregard of Congress' chosen formulation of the state of mind necessary for imposition of a $25,000 penalty has important ramifications for the defense bar. An attorney who seeks to protect his client's privilege based upon a good faith belief in the existence of the privilege faces a Hobson's choice between his client's interest and his own pecuniary interest in avoiding a substantial penalty. Under the Second Circuit's formulation, the penalty attaches so long as the attorney acted knowingly and not accidentally or unconsciously. Through its use of the term "disregard," modified by the term "intentional," Congress expressly limited the IRS' penalty authority. The Second Circuit ignored this express limitation, and, consequently, rendered irrelevant a filer's good faith belief in the existence of the privilege.

C. The Second Circuit's Interpretation of "Intentional Disregard" is Contrary to Caselaw Interpreting that Term

The term "intentional disregard" also has a settled meaning in the cases. Courts have consistently interpreted the term to mean that the filer knew or should have known that the information was legally required, and nevertheless deliberately chose to omit the required information. Under this definition, courts have consistently held that the good faith of the filer is a defense to the penalty. In particular, courts have held that a good faith misunderstanding of the law is a defense to an intentional disregard penalty.

1. Tax Cases

Congress uses the term "intentional disregard" throughout the Code to set the standard by which the IRS is authorized to penalize taxpayers, tax preparers, and others required to file information with the IRS. Former sections 6653(a)(1) and (a)(2) of the Code, for example, imposed an addition to tax if any part of any underpayment was due to negligence or intentional disregard of rules or regulations.[2] The courts have long recognized that a reasonable or good-faith misunderstanding of the law is a defense under these sections. *See, e.g., Heasley v. Commissioner*, 902 F.2d 380, 383-84 (5th Cir.1990) (tax court erred in assessing penalty under § 6653(a) given the petitioners' "honest misunderstandings of law and fact, their reliance on financial advisors, and their efforts to monitor their investment") (internal citation omitted); *Haman v. Commissioner*, 500 F.2d 401, 403 (9th Cir.1974) (reversing penalty assessment under § 6653(a) because, "while the taxpayers were misguided and unsophisticated in the realm of tax law, they acted in good faith, without negligence and without 'intentional disregard' of applicable rules and regulations"); *Yelencsics v. Commissioner*, 74 T.C. 1513, 1533 (1980) (reversing imposition of

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[2] Former § 6653(a)(1) imposed an initial fine of 5 percent of the underpayment and former § 6653(a)(2) imposed a further addition of 50 percent of the interest payable on the portion of the underpayment attributable to negligence or intentional disregard. I.R.C. § 6653 was repealed by the Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, 103 Stat. 2106, § 7721(c)(2), effective for returns due after 1989. Negligence and intentional disregard are now components of the accuracy-related penalty found in I.R.C. § 6662.

addition to tax under section 6653(a) because the "underpayment was not due to negligence or intentional disregard of rules and regulations, but solely to a good-faith misunderstanding of the law") (citing *Wofford v. Commissioner*, 5 T.C. 1152, 1166-67 (1945)); *Brockman Building Corp. v. Commissioner*, 21 T.C. 175, 191 (1953) (no liability under former § 293, the precursor to § 6653(a), because "petitioner has shown enough to establish that it acted in good faith in not reporting the percentage payments as its income"); *Sampson v. Commissioner*, 60 T.C.M. (CCH) 715, 1990 Tax Ct. Memo LEXIS 540, *6 (1990) (petitioners not liable under §§ 6653(a)(1) and (2) because "[w]e are satisfied that petitioners' underpayment was not due to negligence or intentional disregard, but solely to a reasonable or good-faith misunderstanding of the law").

Similarly, courts have held that, by itself, a taxpayer's good faith reliance on expert opinion is a defense to a negligence or intentional disregard penalty under § 6653, even if the advice is wrong. *See, e.g., McMurray v. Commissioner*, 985 F.2d 42 (1st Cir.1993) (noting that "[r]easonable reliance on expert opinion, asserted in good faith, can shield a taxpayer from section 6653(a) penalties[,]" (citing *United States v. Boyle*, 469 U.S. 241, 250 (1985)) and concluding "that the record lacks sufficient evidence of bad faith to support the tax court's negligence ruling");[3]

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[3] In *Boyle*, the Court suggested that the good faith reliance of counsel concerning a question of law might constitute "reasonable cause" for an erroneous filing, and noted that "[c]ourts have frequently held that 'reasonable cause' is established when a taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken." *Boyle*, 469 U.S. at 250 (collecting circuit court cases).

Heasley, F.2d at 303; *Collins v. Commissioner*, 857 F.2d 1383, 1386 (9th Cir.1988); *Goudas v. IRS*, 1996 WL 732829 (U.S. Tax Ct. Dec. 23, 1996) (reasonable, good faith reliance on advice of accountant is defense to intentional disregard penalty under former § 6653(a)(1)), *aff'd on other grounds*, 137 F.3d 368 (6th Cir.1998).

The term "intentional disregard" should be given a consistent meaning throughout the Code. As two commentators have noted:

> No definition of the term 'intentional disregard' is provided in new Sections 6721-6724 imposing these penalties. It appears that the existing, albeit ambiguous, definition of that term as it arises in the general area of negligence penalties will apply. *For example, an unintentional disregard of rules, such as a mistake in interpretation of law or facts made in good faith, will not result in the penalty.*

Robert Greisman and Gary Schaider, *Many Penalties Substantially Increased as a Result of the Tax Reform Act of 1986*, 15 Tax'n for Law. 228 (Jan./Feb. 1987) (emphasis added).[4]

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[4] Congress has also endorsed this uniform construction of "intentional disregard." Section 6694(a) authorizes the IRS to impose a $100 penalty against a tax preparer whose negligent or intentional disregard of rules or regulations results in a tax underpayment. *See* 26 U.S.C. § 6694(a). The legislative history explains the penalty:

> The penalty applies generally to every negligent or intentional disregard of such regulations and rulings *except that a good faith dispute by an income tax return preparer about an interpretation of a statute (expressed in regulations or rulings) is not considered a negligent or intentional disregard of rulings and regulations.* The

The Second Circuit's definition of "intentional disregard" eviscerates the established distinction in tax cases between a good faith belief that one's conduct is in conformity with the law (which negates a finding of willful or intentional disregard) and a good faith belief that the law itself is invalid (which does not). In this respect, *Lefcourt* is inconsistent with the Second Circuit's own precedent.

In *Druker v. Commissioner*, 697 F.2d 46 (2d Cir.1982) (Friendly, J.), *cert. denied*, 461 U.S. 957 (1983), married taxpayers filed a tax return claiming the benefit of the lower rate applicable to single taxpayers on the grounds that the distinction was unconstitutional. The IRS subsequently asserted a penalty under § 6653(a) for intentional disregard of the filing requirement. The Second Circuit held that the penalty was applicable to the Drukers because, although they believed the statute was illegal, they in fact knew that, as written, it applied to them. The court carefully distinguished the situation, however, where a taxpayer believes that his conduct is in conformity with the statute, citing several cases for the proposition that a taxpayer has not intentionally disregarded a

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> provision is thus to be interpreted in a manner similar to the interpretation given the provision under present law (sec. 6653(a)) relating to the disregard of rules and regulations by taxpayers on their own returns.

H.R. Rep. No. 94-658, 94th Cong., 2d Sess. 278, reprinted in 1976 U.S.C.A.A.N. at 3174 (emphasis added); *see also* S.Rep. No. 94-938, 94th Cong. 2d Sess. 355, reprinted in 1976 U.S.C.A.A.N. at 3784.

statute or regulation where he "believed, albeit erroneously, that what [he] had done complied with the regulations." *Druker*, 697 F.2d at 54 (citing *Commissioner v. S.A. Woods Machine Co.*, 57 F.2d 635 (1st Cir.1932), *Brockman Building Corp.*, 21 T.C. at 191, and *Scott v. Commissioner*, 61 T.C. 654 (1974)).

2. Non-Tax Cases

The term "intentional disregard" is used in a variety of other contexts to gauge a party's liability. Like the tax cases, courts have consistently interpreted the term to mean that a party knew or should have known of his legal obligation, and consciously and deliberately chose to disregard or ignore that obligation. These cases teach that a good faith, although erroneous, belief that one's conduct is *in compliance* with applicable rules and regulations negates a finding of intentional disregard. *See, e.g., Donovan v. Mica Constr.*, 699 F.2d 431-32 (8th Cir.1983) (no "intentional disregard" of OSHA requirements, and accordingly, "no willful violation of the standard," where employer had good faith, although erroneous, belief that trenches were exempt from OSHA); *United States v. Loyd*, 721 F.2d 331, 333 (11th Cir.1983) (per curiam) (refusing to suppress evidence discovered pursuant to search warrant issued in violation of Rule 41 of the Federal Rules of Criminal Procedure because there was "no evidence to indicate bad faith or an intentional disregard of the rule"). *See also United States v. Freeman*, 897 F.2d 346, 350 (8th Cir.1990) (endorsing same standard); *United States v. Comstock*, 805 F.2d 1194, 1207 (5th Cir.1986) (same), *cert. denied*, 481 U.S. 1022 (1987).

Based on the foregoing considerations, this Court should grant certiorari to decide whether the Second Circuit's interpretation of "intentional disregard" is contrary to the plain meaning of the statute and the settled understanding of the term in caselaw.

II. The Court Should Grant Certiorari Because the Second Circuit Improperly Applied a Purely Objective Test in Evaluating "Reasonable Cause" under the Mandatory Waiver Provision of 26 U.S.C. § 6724

Section 6724(a) of the Code requires a mandatory waiver of the "intentional disregard" penalty when the failure is due to "reasonable cause." "No penalty shall be imposed under this part with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect." 26 U.S.C. § 6724(a). Under the Second Circuit's analysis, the filer's subjective good faith belief that he is in compliance with the law's requirements is considered in neither the "intentional disregard" nor the "reasonable cause" standard. As demonstrated above, this construction is contrary to the plain language of the statute and the caselaw. As demonstrated below, it is an unworkable standard for a national program.

The Second Circuit interpreted "reasonable cause" as a purely objective standard. *See Lefcourt*, 125 F.3d at 84 (stating the test as whether the filer's reason for failing to include the information was "objectively reasonable under the circumstances"). Under the Second Circuit's interpretation of "reasonable cause" the filer's objective reasonableness is evaluated by the court solely by reference to that circuit's precedent. Thus, the Second Circuit

analyzed its precedent and, interpreting its cases, *read together*, concluded that, as a matter of law, Lefcourt should have known that his argument would not prevail, and therefore that he did not act as a reasonably prudent attorney would act under the circumstances. *Id.* at 88-89.

The Second Circuit's analysis of "reasonable cause" fundamentally misconstrues the attorney's role in the adversary process. As the Fifth Circuit has explained:

> One of the basic tenets of our adversarial legal system is that the lawyer owes the client loyalty and zealous representation. *That duty includes advocating positions which the lawyer in good faith believes have an arguable basis despite contrary authority.* It also includes confidentiality: as a general rule, the lawyer may not divulge client confidences except in very limited instances. These ethical obligations are enforceable; a lawyer violating them may find himself before the state Supreme Court facing sanctions up to and including disbarment.

United States v. Cavin, 39 F.3d 1299, 1308 (5th Cir.1994) (emphasis added). *See also* Code of Professional Responsibility DR 4-101; Model Rules of Professional Conduct Rules 1.6 & 1.8(b).

In the early 1990s, a host of federal circuit and district courts addressed the parameters of the "special circumstances" exception to the general rule that client identity is not privileged. *See, e.g., United States v. Sindel*, 53 F.3d 874, 876 (8th Cir.1995); *Ralls v. United States*, 52 F.3d 223 (9th Cir.1995); *United States v. Leventhal*, 961 F.2d 936 (11th Cir.1992); *In re Grand Jury Subpoenas (Anderson)*,

906 F.2d 1485, 1491 (10th Cir.1990); *United States v. Gertner*, 873 F.Supp. 729, 735-736 (D.Mass.), *aff'd on other grounds*, 65 F.3d 963 (1st Cir.1995); *United States v. Monnat*, 853 F.Supp. 1301, *dismissed as moot*, 853 F.Supp. 1304 (D.Kan.1994). Lefcourt argued, *inter alia*, that his client's identity was privileged under the "legal advice" exception, which holds that client-identifying information is privileged "where there is a strong probability that disclosure would implicate the client in the very criminal activity for which legal advice was sought." *Anderson*, 906 F.2d at 1488. The Second Circuit interpreted its prior decisions in *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2d Cir.1991) and *Grand Jury Subpoena Duces Tecum Served Upon Gerald L. Shargel*, 742 F.2d 61 (2d Cir.1984), *"read together,"* as rejecting this argument. *Lefcourt*, 125 F.2d at 86 (emphasis added).

The court's analysis of *Goldberger* and *Shargel* demonstrates the untenable position in which *Lefcourt* places attorneys. This is because, regardless of how much *Goldberger* and *Shargel* may have clarified the "special circumstances" question, the cases were decided in 1991 and 1984, respectively, and the court's subsequent decision in *Vingelli v. United States*, 992 F.2d 449 (2d Cir.1993) obfuscated the issue. After acknowledging that client identity is privileged under "special circumstances," the *Vingelli* court stated:

> What those 'special circumstances' are that would protect this information has not been precisely defined. What they are remains as enigmatic as the smile that Leonardo Da Vinci left us on the face of the Mona Lisa. In light of defense counsel's argument, our task is to examine the

> special circumstances rules to see if they apply in the present case.

Vingelli, 992 F.2d at 450. A reasonable attorney reading this language would believe that the issue of "special circumstances" was still very much open in the Second Circuit. The only question would be whether *Vingelli* itself clarified the issue.

Lefcourt suggests that it did, but the court's careful choice of language belies the suggestion. Of the legal advice exception, the court states: "In fact, we all but categorically rejected it in *Vingelli* . . . , where we took pains to distinguish the legal advice exception from the confidential communications exception that is recognized in this circuit." *Lefcourt*, 125 F.2d at 87. The words "all but" are critical because, in fact, *Vingelli* neither embraced nor rejected the legal advice exception. Rather, in dicta, it simply noted that the legal advice exception was originally adopted and then later limited by the Ninth Circuit. *Vingelli*, 992 F.2d at 452-53. It appears, therefore, that the Second Circuit's purely objective test of "reasonable cause" requires that an attorney must review not only the pertinent circuit's *rulings* on the attorney-client privilege, but also must interpret the language used in the court's cases and correctly predict how the court will rule in the future.

The Second Circuit's limited definition of "intentional disregard" rendered irrelevant Lefcourt's asserted good faith belief that he was in fact complying with the filing requirement, so long as he acted consciously rather than accidentally. The Second Circuit then compounded its error by formulating a test under the mandatory

waiver provision that also ignored the filer's good faith belief that he is in compliance with the law. The statute as a whole cannot fairly be read as precluding, under both the "intentional disregard" and mandatory waiver provisions of § 6721 and § 6724, consideration of a taxpayer's good faith belief that he is in compliance with the law.

The Second Circuit's formulation is an unworkable standard for a national penalty program. For example, a New York lawyer who is paid in cash by a client in Louisiana must comply with two different rules governing attorney-client privilege. *Compare In re Grand Jury Subpoena (DeGuerin)*, 926 F.2d 1423, 1432 (5th Cir.1991) (identity of client who paid another client's fee privileged) *with In re Grand Jury Subpoena (Doe)*, 781 F.2d 238, 249 (2d Cir.1986) (en banc) (benefactor identity not privileged), *cert. denied*, 475 U.S. 1108 (1986). Because the Fifth Circuit recognizes broader protection of client identity than the Second Circuit, the attorney in this situation would be bound by state ethical rules not to reveal his client's identity. Under *Lefcourt*, however, the attorney would then be subject to a $25,000 penalty by the IRS.

The IRS has available to it a much less intrusive means to enforce the disclosure requirements of 26 U.S.C. § 6050I. Indeed, prior to the IRS's imposition of a fine against Lefcourt, a settled practice had emerged in the cases whereby the government would first seek the withheld information by summons or grand jury subpoena. *See, e.g., Sindel*, 53 F.3d 874; *Ralls*, 52 F.3d 223; *Leventhal*, 961 F.2d 936; *In re Grand Jury Subpoena (Anderson)*, 906 F.2d 1485; *In re Grand Jury Subpoena (DeGuerin)*, 926 F.2d 1423 (5th Cir.1991); *In re Grand Jury Proceeding (Cherney)*, 898 F.2d 565 (7th Cir.1990); *Gertner*, 873 F.Supp. at

735-736; *Monnat*, 853 F.Supp. at 1301. Under this procedure a neutral fact-finder – a district court judge – decides whether the information should be disclosed. In many instances, the district court makes its decision only after an *in camera* review of the factual predicate supporting the assertion of privilege. *See, e.g., Sindel*, 53 F.3d at 876. This settled procedure enables the attorney to properly balance his ethical obligations to his client with his duty to obey federal law.

CONCLUSION

For the foregoing reasons, and the reasons included in the Petition for Writ of Certiorari, this Court should grant certiorari to decide whether the Court of Appeals' decision is contrary to the plain language of the statute and the caselaw.

Respectfully submitted,

SAMUEL J. BUFFONE
Counsel of Record
PETER K. LEVITT
ROPES & GRAY
1301 K Street, N.W., Suite 800 East
Washington, DC 20005-3333
(202) 626-3900

LISA B. KEMLER
ZWERLING & KEMLER
P.O. Box 20002
Alexandria, VA 22320
(703) 684-8000